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Annotated

**2014
ADVANCE
CODE
SERVICE**

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PREFACE

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The 2014 Advance Code Service ensures that your Mississippi Code of 1972 Annotated is always as current as possible by providing Judicial Decision notes, Attorney General Opinions, Ethics Opinions, research references, and references to law review articles. The ACS may also include changes to statutory provisions, and editorial comments. It ships three times a year, in the period between annual Code supplement pamphlet shipments. Advance Code Service pamphlets are cumulative and may be discarded or recycled upon receipt of later pamphlets.

Format.

Material in the Advance Code Service follows the structure of the Mississippi Code of 1972 Annotated and should be used in conjunction with the Code and its 2013 Supplement.

Annotations.

This publication contains annotations taken from decisions of the Mississippi Supreme Court and Court of Appeals. These cases will be printed in the following reporters:

Southern Reporter, 3rd Series
United States Supreme Court Reports
Supreme Court Reporter
United States Supreme Court Reports, Lawyers' Edition, 2nd Series
Federal Reporter, 3rd Series
Federal Supplement, 2nd Series
Federal Rules Decisions
Bankruptcy Reporter

Additionally, annotations have been taken from the following sources:

American Law Reports, 6th Series
American Law Reports, Federal Series
Mississippi College Law Review
Mississippi Law Journal

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PREFACE

Information, suggestions, comments, and questions.

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U.S. CONSTITUTION

AMENDMENTS

AMENDMENT IV

SEARCH AND SEIZURE

JUDICIAL DECISIONS

27. Search without warrant — In general.

33. —Motor vehicles, search without warrant.

27. Search without warrant — In general.

33. —Motor vehicles, search without warrant.

Traffic stop was reasonable where an officer determined via his radar that de-

fendant's speed was 69 miles per hour in a 55 mile per hour zone, and testified that he estimated the speed by following defendant; even if the officer was operating his radar incorrectly, his testimony established a reasonable belief that speeding, a traffic violation, had occurred. *Freeman v. State*, — So. 2d —, 2013 Miss. LEXIS 312 (Miss. May 30, 2013).

AMENDMENT V

GRAND JURY INDICTMENT FOR CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION;
DUE PROCESS OF LAW; JUST COMPENSATION FOR PROPERTY

JUDICIAL DECISIONS

17. Self-incrimination — In general.

24. —Request for counsel, self-incrimination.

31.5. — Custodial interrogation, self-incrimination.

17. Self-incrimination — In general.

24. —Request for counsel, self-incrimination.

Trial court manifestly erred in failing to suppress defendant's statement to the police because the police subjected defendant to interrogation after he had invoked his right to counsel, and the State failed to prove that defendant's waiver of rights was knowing, intelligent, and voluntary. *Benjamin v. State*, — So. 2d —, 2013 Miss. LEXIS 322 (Miss. June 6, 2013).

31.5. — Custodial interrogation, self-incrimination.

When the police encourage a parent to pressure a 14-year-old suspect to talk, and

the police foster the suspect's mistaken belief that talking would allow him to avoid a night in jail, the police should know their conduct is reasonably likely to elicit an incriminating response; the tactics used by police that encouraged defendant's belief that, by talking to the police, he could avoid a night in jail, and that allowed his mother to speak with defendant after instructing her on how he could reinitiate questioning constituted the functional equivalent of interrogation because they were reasonably likely to elicit an incriminating response from the 14-year-old defendant. *Benjamin v. State*, — So. 2d —, 2013 Miss. LEXIS 322 (Miss. June 6, 2013).

Where the police used tactics that constituted the functional equivalent of interrogation, because they were reasonably likely to elicit an incriminating response from defendant, defendant was subjected to interrogation after invoking his right to

counsel. Benjamin v. State, — So. 2d —, 2013 Miss. LEXIS 322 (Miss. June 6, 2013).

AMENDMENT VIII

EXCESSIVE BAIL, FINES, PUNISHMENTS

JUDICIAL DECISIONS

- 15. Cruel and unusual punishment — In general.
- 16. — Age of defendant, cruel and unusual punishment.
- 15. Cruel and unusual punishment — In general.**
- 16. — Age of defendant, cruel and unusual punishment.**

Where a juvenile convicted of murder receives a life sentence, conditional release does not satisfy the mandate of Miller v. Alabama, 2012 U.S. LEXIS 4873, because conditional release is more akin to clemency, which is different from parole despite some surface similarities, and conditional release would not be determined by the sentencing authority at the time of sentencing based on age and other characteristics, as Miller mandates. Parker v.

State, — So. 2d —, 2013 Miss. LEXIS 321 (Miss. June 6, 2013).

Miss. Code Ann. § 47-7-3(1)(h) can constitutionally be applied to juveniles provided that the sentencing authority considers the factors of Miller v. Alabama, 2012 U.S. LEXIS 4873, in imposing the sentence. Parker v. State, — So. 2d —, 2013 Miss. LEXIS 321 (Miss. June 6, 2013).

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann § 47-7-3(1)(h) was not eligible for parole, and as Miller v. Alabama, 2012 U.S. LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the Miller factors before determining sentence. Parker v. State, — So. 2d —, 2013 Miss. LEXIS 321 (Miss. June 6, 2013).

AMENDMENT XIV

CITIZENSHIP; PRIVILEGES AND IMMUNITIES; DUE PROCESS; EQUAL PROTECTION; APPOINTMENT OF REPRESENTATION; DISQUALIFICATION OF OFFICERS; PUBLIC DEBT; ENFORCEMENT

JUDICIAL DECISIONS

- 12. Equal protection — In general.
- 104. Criminal practice and procedure — In general.
- 121. — Conduct of trial, criminal practice and procedure.
- 12. Equal protection — In general.**

Bar applicant's Equal Protection claim failed as a matter of law because not only did the applicant fail to allege purposeful discrimination, but the applicant also failed to offer any evidence that the Mississippi Board of Bar Admissions' rules and policies actually had a disproportionate impact. Griffin v. Miss. Bd. of Bar

Admissions, — So. 2d —, 2013 Miss. LEXIS 314 (Miss. May 30, 2013).

- 104. Criminal practice and procedure — In general.**
- 121. — Conduct of trial, criminal practice and procedure.**

Defendant's due process rights were violated where the State destroyed a video of a traffic stop and the moments before it while under a court order to preserve it, which impaired the defense since the video would have clarified material disputed facts as to whether defendant ad-

mitted to drinking alcohol, whether he slurred his words, whether his coordination was impaired, how he was driving immediately prior to the stop, the interac-

tion between the two men and the portable breath test results. *Freeman v. State*, — So. 2d —, 2013 Miss. LEXIS 312 (Miss. May 30, 2013).



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THE CONSTITUTION OF THE STATE OF MISSISSIPPI

ARTICLE 1.

DISTRIBUTION OF POWERS.

§ 1. Powers of government.

JUDICIAL DECISIONS

8. Judicial powers and functions—In general.

Power to grant the authority to require parents in Mississippi to support their adult children financially was confided to

the Mississippi Legislature. The Mississippi courts were without the constitutional power to declare otherwise. *Hays v. Alexander*, — So. 2d —, 2013 Miss. LEXIS 324 (Miss. June 6, 2013).

ARTICLE 3.

BILL OF RIGHTS.

§ 26. Rights of accused; state grand jury proceedings.

JUDICIAL DECISIONS

108. Confrontation of witnesses — In general.

114. — — Unavailable witnesses, confrontation of witnesses.

108. Confrontation of witnesses — In general.

114. — — Unavailable witnesses, confrontation of witnesses.

Admission of a police detective's videotaped deposition testimony into evidence

was not an abuse of discretion because the detective had serious health complications and was considered by the circuit judge to have been unavailable at the trial. Moreover, defense counsel had the opportunity to cross-examine the detective during the deposition, with defendant present. *Mckenzie v. State*, — So. 2d —, 2013 Miss. App. LEXIS 480 (Miss. Ct. App. Aug. 6, 2013).

ARTICLE 6.

JUDICIARY.

§ 177A. Commission on Judicial Performance.

JUDICIAL DECISIONS

7. Willful misconduct.

8. Sanctions—In general.

7. Willful misconduct.

Judge committed willful misconduct and conduct prejudicial to the administration of justice, bringing the judicial office into disrepute, because the judge recused

himself from cases, and then, with full knowledge that he was recused, reinserted himself and took further action in the cases; the judge abused the contempt power by issuing arrest warrants for indirect criminal contempt that led to parents being held without bond for seventy-two hours without notice or a hearing; *Miss.*

Comm'n on Judicial Performance v. Skinner, — So. 2d —, 2013 Miss. LEXIS 391 (Miss. Aug. 1, 2013).

Analysis of the extent of willfulness will allow for consideration of acts of dishonesty, and the inappropriateness of the action may also be considered under the aggravating circumstances factor; when analyzing the extent to which the conduct exploited the judge's position to satisfy personal desires, we will examine factors such as whether the judge received money, received favors, or otherwise acted in a manner indicative of any improper personal motivation. Miss. Comm'n on Judicial Performance v. Skinner, — So. 2d —, 2013 Miss. LEXIS 391 (Miss. Aug. 1, 2013).

Supreme court will examine the extent to which the conduct was willful, and the extent to which the conduct exploited the judge's position to satisfy his or her personal desires or was intended to deprive the public of assets or funds rightfully belonging to it; in examining the extent to which the conduct was willful, the supreme court will examine whether the judge acted in bad faith, good faith, intentionally, knowingly, or negligently. Miss. Comm'n on Judicial Performance v. Skinner,

— So. 2d —, 2013 Miss. LEXIS 391 (Miss. Aug. 1, 2013).

8. Sanctions—In general.

Judge was publicly reprimanded, suspended, and fined because he committed willful misconduct and conduct prejudicial to the administration of justice when he recused himself from cases and reinserted himself and took further action in the cases and abused the contempt power; however, there was no evidence of any premeditation, that the judge's conduct was done to satisfy any personal desires, or that the judge personally gained from his actions. Miss. Comm'n on Judicial Performance v. Skinner, — So. 2d —, 2013 Miss. LEXIS 391 (Miss. Aug. 1, 2013).

As a judge violated Miss. Code Jud. Conduct Canons 1, 2(A), 2(B), 3(B)(2), 3(B)(4), and 3(C)(1), and Miss. Const. art. VI, § 177A by attempting to use his office to advance the private interests of his tenant and himself as landlord, and by being impatient and discourteous and abusing his contempt power when arguing with a probation officer, and he had a pattern of prior misconduct, he was publicly reprimanded and fined. Miss. Comm'n on Judicial Performance v. Fowlkes, — So. 2d —, 2013 Miss. LEXIS 492 (Miss. Sept. 19, 2013).

TITLE 1

LAWS AND STATUTES

CHAPTER 3

Construction of Statutes

§ 1-3-27. Minor.

JUDICIAL DECISIONS

2. Child support.

Chancery court did not abuse its discretion by declining to require a parent to provide post-majority financial support for the parent's child because Mississippi law did not vest the court with the authority to mandate that parents financially

support their offspring post-majority. The duty imposed for a parent to support its child does not extend beyond the child's minority, which terminates when the child reaches twenty-one years of age. *Hays v. Alexander*, — So. 2d —, 2013 Miss. LEXIS 324 (Miss. June 6, 2013).

TITLE 11

CIVIL PRACTICE AND PROCEDURE

CHAPTER 7

Practice and Procedure in Circuit Courts

IN GENERAL

§ 11-7-211. Bills of exception may be amended.

JUDICIAL DECISIONS

2. Illustrative cases.

Where, in response to appellant's motion to supplement the record, a school board filed an amended bill of exceptions, although appellant had only three days' notice of the proposed amendment, its

motion to strike the amended bill was properly denied because any deficiency in notice did not affect its substantial rights. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 2d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

CHAPTER 11

Venue of Actions

IN GENERAL

§ 11-11-3. County in which to commence civil actions; dismissal of actions more properly heard in another forum; transfer of action to proper county; factors determining grant of motion to dismiss or transfer.

JUDICIAL DECISIONS

4.5 Venue where acts or substantial event occurred.

5. Venue as to corporations.

6. —Where cause of action occurs or accrues.

4.5 Venue where acts or substantial event occurred.

It was error to deny insureds' motion to transfer venue to Smith County in an insurer's action disputing coverage, as the insurer failed to provide sufficient facts to show that venue was proper in Rankin County because there was no "significant act or omission" or "substantial event causing injury" there; the insureds resided in Smith County, the accident happened there, and any misrepresentations

in the policy occurred in Covington County. *Wood v. Safeway INS. Co.*, — So. 2d —, 2013 Miss. LEXIS 325 (Miss. June 6, 2013).

5. Venue as to corporations.

6. —Where cause of action occurs or accrues.

Trial court did not abuse its discretion in transferring venue to Clarke County, Mississippi pursuant to Miss. Code Ann. § 11-11-3 because a company was a non-resident defendant; thus, venue was appropriate in Clarke County because the substantial alleged act or substantial event causing the injury occurred there, and the subcontractor sought a scheduling

order and a trial setting in Clarke County. Llc, — So. 2d —, 2013 Miss. App. LEXIS
Reeves v. Midcontinent Express Pipeline, 263 (Miss. Ct. App. May 14, 2013).

CHAPTER 15

Arbitration and Award

IN GENERAL

§ 11-15-23. Vacation of award; grounds.

JUDICIAL DECISIONS

2. Specific grounds for vacating award.

Chancellor erred in setting aside an arbitration award because, although undue means and unresolved issues could be valid reasons for setting aside an award, the chancellor's order failed to articulate

any "undue means" utilized or any specific deficiencies with the arbitrators' thorough analysis and valuation methods. Bailey Brake Farms, Inc. v. Trout, — So. 2d —, 2013 Miss. LEXIS 303 (Miss. May 23, 2013).

CHAPTER 27

Eminent Domain

IN GENERAL

§ 11-27-19. Evidence of value; award and interest.

JUDICIAL DECISIONS

1. In general.

Owner was properly awarded eight percent interest from the date the petition to condemn was filed, rather than from the

date a law firm improperly filed a lis pendens. Lehman v. Miss. Transp. Comm'n, — So. 2d —, 2013 Miss. App. LEXIS 363 (Miss. Ct. App. June 18, 2013).

RIGHT TO IMMEDIATE POSSESSION

§ 11-27-87. Effect of insufficiency or excess of deposit.

JUDICIAL DECISIONS

1. In general.

Owner was properly awarded eight percent interest from the date the petition to condemn was filed, rather than from the

date a law firm improperly filed a lis pendens. Lehman v. Miss. Transp. Comm'n, — So. 2d —, 2013 Miss. App. LEXIS 363 (Miss. Ct. App. June 18, 2013).

CHAPTER 46

Immunity of State and Political Subdivisions From Liability and
Suit for Torts and Torts of Employees**§ 11-46-5. Waiver of immunity; course and scope of employment; presumptions.**

JUDICIAL DECISIONS

2. Applicability of waiver.
3. Course and scope of employment.

2. Applicability of waiver.

To the extent the parents' and student's claim for intentional infliction of emotional distress (as a result of alleged repeated failure to protect the student from bullying) is based on malicious conduct, it was not barred by the Mississippi Tort Claims Act as to the individual school district officials and immunity was not waived as to the school district. *R.S. v. Starkville Sch. Dist.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

3. Course and scope of employment.

In a case in which property owners alleged that a county supervisor, a con-

tractor, and a subcontractor engaged in a scheme to profit from a debris-removal contract between a county and the contractor by not paying the property owners for providing a dumpsite, the property owners were not required to give the county supervisor notice of their claims because the property owners alleged that the county supervisor's conduct amounted to fraud and malice and such conduct was outside the scope of the county supervisor's employment. *Bradley v. Kelley Bros. Contrs., Inc.*, — So. 2d —, 2013 Miss. App. LEXIS 340 (Miss. Ct. App. June 11, 2013).

§ 11-46-7. Exclusiveness of remedy; joinder of government employee; immunity for acts or omissions occurring within course and scope of employee's duties; provision of defense for and payment of judgments or settlements of claims against employees; contribution or indemnification by employee.

JUDICIAL DECISIONS

3. Course and scope of duties.

Miss. Code Ann. § 37-9-69 applied to alleged ministerial acts of negligent failure to enforce school district policies, failure to respond to a student's bullying by other students, and failure to discipline those bullies, thus, Miss. Cod Ann. § 11-46-9(1)(a), (d)'s discretionary immunity did not bar those claims; finding that the alleged conduct was ministerial rather than discretionary did not remove the absolute personal immunity afforded the individual officials for actions committed

within the course and scope of employment. *R.S. v. Starkville Sch. Dist.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

In judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' superceadeas bonds prevented the creditors from recovering from the bonds, as the clerk was acting in the course and scope of his employment, he was not personally liable to the creditors; therefore, he was not obligated to indemnify the surety on his performance

bond. *Newton County v. State Ex Rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013).

In judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' superceadeas bonds prevented the creditors from recovering

from the bonds, as the clerk was acting in the course and scope of his employment when he approved the bonds, he and the county were immune from liability. *Newton County v. State Ex Rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013).

§ 11-46-9. Exemption of governmental entity from liability on claims based on specified circumstances.

JUDICIAL DECISIONS

6.5. Ministerial duty.

Miss. Code Ann. § 37-9-69 applied to alleged ministerial acts of negligent failure to enforce school district policies, failure to respond to a student's bullying by other students, and failure to discipline

those bullies, thus, Miss. Cod Ann. § 11-46-9(1)(a), (d)'s discretionary immunity did not bar those claims. *R.S. v. Starkville Sch. Dist.*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

§ 11-46-11. Statute of limitations; notice of claim requirements; savings clause in favor of infants and those of unsound mind.

JUDICIAL DECISIONS

- 4. Applicability.
- 10. Discovery rule.
- 15. Illustrative cases.

4. Applicability.

In a case in which property owners alleged that a county supervisor, a contractor, and a subcontractor engaged in a scheme to profit from a debris-removal contract between a county and the contractor by not paying the property owners for providing a dumpsite, the property owners were not required to give the county supervisor notice of their claims because the property owners alleged that the county supervisor's conduct amounted to fraud and malice and such conduct was outside the scope of the county supervisor's employment. *Bradley v. Kelley Bros. Contrs., Inc.*, — So. 2d —, 2013 Miss. App. LEXIS 340 (Miss. Ct. App. June 11, 2013).

Judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' superceadeas bonds prevented the creditors from recovering from the bonds was governed by the Mississippi Tort Claims Act; therefore, the

Act's one-year statute of limitations, not the general three-year limitations period, applied. *Newton County v. State Ex Rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013).

10. Discovery rule.

Judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' superceadeas bonds prevented the creditors from recovering from the bonds was timely under the Mississippi Tort Claims Act's one-year statute of limitations, because it was filed within a year after judgment was rendered on the bonds. *Newton County v. State Ex Rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013).

15. Illustrative cases.

Trial court did not abuse its discretion by determining that no good cause was shown by a property owner in failing to timely serve process on a county under Miss. R. Civ. P. 4, because the owner made no attempt to obtain an extension of time

to serve process on the county. *Sturdivant v. Moore Bayou Water Ass'n*, — So. 2d —, 2013 Miss. App. LEXIS 493 (Miss. Ct. App. Aug. 13, 2013).

CHAPTER 51

Appeals

§ 11-51-31. Bond for supersedeas.

JUDICIAL DECISIONS

2. Bond on supersedeas.

In judgment creditors' suit alleging a court clerk's negligence in approving the judgment debtors' superceadeas bonds prevented the creditors from recovering from the bonds, as the clerk was acting in

the course and scope of his employment when he approved the bonds, he and the county were immune from liability. *Newton County v. State Ex Rel. Dukes*, — So. 2d —, 2013 Miss. App. LEXIS 332 (Miss. Ct. App. June 4, 2013).

§ 11-51-101. State, county, and municipality, and officials representing them, may appeal without bond; prepayment of costs in lower court; costs of record of trial court.

JUDICIAL DECISIONS

2. Particular applications.

Trial court erred in enforcing a supersedeas bond against a city as a surety because the bond did not include two valid sureties or a surety company, and thus, the circuit clerk did not have the authority to receive it or issue supersedeas upon it;

the city was not required to post a bond to stay the judgment and pursue its appeal because it was exempted by statute and procedural rule from the requirement to file a supersedeas bond. *City of Belzoni v. Johnson*, — So. 2d —, 2013 Miss. LEXIS 472 (Miss. Sept. 12, 2013).

CHAPTER 53

Costs

§ 11-53-17. Poor persons may sue without security for costs.

JUDICIAL DECISIONS

1. In general.

In a premises liability case, plaintiff was not entitled to proceed in forma pauperis on appeal, as any right to proceed in

forma pauperis in a civil case existed only at the trial level. *Davis v. Office Max*, — So. 2d —, 2013 Miss. App. LEXIS 428 (Miss. Ct. App. July 16, 2013).

CHAPTER 55

Litigation Accountability Act of 1988

§ 11-55-5. Assessment of attorney fees and costs against attorney or party for meritless action, claim or defense, unwarranted delay, or unnecessary proceedings.

JUDICIAL DECISIONS

4. Attorneys' fees awarded not excessive.

Owner was properly awarded attorneys fees and costs of \$ 32,837.06 for slander of title where a law firm filed lis pendens notices claiming that the land the transportation commission was seeking to condemn was of interest in a Louisiana ac-

tion, when in fact the land had nothing to do with the Louisiana action and the same parties were not involved; the firm stipulated that the \$ 200 per hour rate was reasonable *Lehman v. Miss. Transp. Comm'n*, — So. 2d —, 2013 Miss. App. LEXIS 363 (Miss. Ct. App. June 18, 2013).

TITLE 13
EVIDENCE, PROCESS AND JURIES

CHAPTER 1

Evidence

IN GENERAL

§ 13-1-5. Competency of husband and wife.

JUDICIAL DECISIONS

5. Witness against other spouse.

Because defense counsel failed to lodge an objection to the husband's testimony against defendant at trial, defendant's

claim was barred from review. *Sandlin v. State*, — So. 2d —, 2013 Miss. LEXIS 538 (Miss. Oct. 10, 2013).

CHAPTER 5

Juries

§ 13-5-67. Impaneling of alternate jurors.

JUDICIAL DECISIONS

2. Application.

Circuit court properly exercised its discretion in excusing a juror who was allegedly sleeping during the presentation of the audio evidence of the victim's inter-

view with the doctor and replacing him with an alternate juror. *Carpenter v. State*, — So. 2d —, 2013 Miss. App. LEXIS 551 (Miss. Ct. App. Sept. 3, 2013).

TITLE 15

LIMITATIONS OF ACTIONS AND PREVENTION OF FRAUDS

CHAPTER 1

Limitation of Actions

§ 15-1-35. Limitations applicable to actions for certain torts.

JUDICIAL DECISIONS

10. Intentional infliction of emotional distress.

Where an employee's claim of intentional infliction of emotional distress was based on the same allegations underlying the employee's complaints of employment

discrimination, the claim was time-barred because the complaint was filed more than one year after the employee was terminated. *Fife v. Vicksburg Healthcare, Llc*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 67748 (S.D. Miss. May 13, 2013).

§ 15-1-49. Limitations applicable to actions not otherwise specifically provided for.

JUDICIAL DECISIONS

15. Torts, generally.

24. —Malpractice.

39. Particular cases; miscellaneous.

43. —Employment.

15. Torts, generally.

24. —Malpractice.

Although an oil company's property became infested with alligators well outside the three-year limitations period for a private nuisance claim filed by the adjoining owners, a fact issue as to whether the infestation should have been discovered prior to the owners' purchase of their property precluded summary judgment where: (1) the owners' property was overgrown; (2) undergrowth could have concealed the alligators; and (3) alligator infestation was an unusual injury that did not put the owners' on notice by an occasional sighting. *Christmas v. Exxon Mobil*

Corp., — So. 2d —, 2013 Miss. App. LEXIS 301 (Miss. Ct. App. May 28, 2013).

39. Particular cases; miscellaneous.

43. —Employment.

Chancery court properly ruled that a teacher's claim for relief was barred by the statute of limitations because she failed to refile her complaint in chancery court until she again alleged a breach of contract and sexual discrimination as an original complaint; since the teacher failed to properly perfect an appeal of the school district's decision affirming her termination and to obtain federal ancillary jurisdiction over her state-law claim, no tolling of the statute of limitations occurred. *Lacour v. Claiborne County Sch. Dist.*, — So. 2d —, 2013 Miss. App. LEXIS 481 (Miss. Ct. App. Aug. 6, 2013).

§ 15-1-69. Commencement of new action subsequent to abatement or defeat of original action.

JUDICIAL DECISIONS

6. Action improperly dismissed.

Chancery court properly ruled that a teacher's claim for relief was barred by the statute of limitations because she failed to refile her complaint in chancery court until she again alleged a breach of contract and sexual discrimination as an original complaint; since the teacher failed to

properly perfect an appeal of the school district's decision affirming her termination and to obtain federal ancillary jurisdiction over her state-law claim, no tolling of the statute of limitations occurred. *Lacour v. Claiborne County Sch. Dist.*, — So. 2d —, 2013 Miss. App. LEXIS 481 (Miss. Ct. App. Aug. 6, 2013).

CHAPTER 3

Prevention of Frauds

ARTICLE 1.

IN GENERAL.

§ 15-3-1. Certain contracts to be in writing.

JUDICIAL DECISIONS

3. Oral promises and contracts.

Chapter 13 debtor's claim that he had an oral agreement with a creditor to sell the creditor a company he owned that manufactured and sold bird calls, in exchange for payment of \$250,000 in five \$50,000 increments over five years and the creditor's promise to forgive debts the

debtor owed under several promissory notes he signed, was barred by two Mississippi statutes of frauds: Miss. Code Ann. §§ 15-3-1 and 75-2-201. *Ziegler v. Hood* (in re Hood), — Bankr. —, 2013 Bankr. LEXIS 3709 (Bankr. N.D. Miss. Sept. 3, 2013).

TITLE 19

COUNTIES AND COUNTY OFFICERS

CHAPTER 3

Board of Supervisors

IN GENERAL

§ 19-3-40. Power of board to adopt, modify, alter, or repeal orders, resolutions or ordinances not inconsistent with law.

JUDICIAL DECISIONS

2. No state preemption.

Forrest County Board of Supervisors had the authority to enact a fencing ordinance under the home rule statute and the ordinance was not preempted by state law since: (1) the Mississippi legislature had not expressly granted the Mississippi Oil and Gas Board (OGB) the exclusive authority to address industry safety is-

sues: (2) the ordinance was not inconsistent with state oil and gas statutes and regulations; and (3) the OGB had not promulgated any regulation prohibiting perimeter fencing. *Delphi Oil, Inc. v. Forrest County Bd. of Supervisors*, — So. 2d —, 2013 Miss. LEXIS 326 (Miss. June 6, 2013).

CHAPTER 5

Health, Safety and Public Welfare

WATER, SEWER, GARBAGE DISPOSAL, AND FIRE PROTECTION DISTRICTS

§ 19-5-177. Additional powers of districts.

JUDICIAL DECISIONS

3. Fee for fire protection services.

Diamondhead Fire Protection District's (DFPD) fee for fire-protection services was permissible since the DFPD provided a valuable service by having fire and other emergency services available to respond to an emergency; the owners' claim that they received a service from the fire de-

partment only if the department responded to an emergency call and that the assessed fees were really for anticipatory services was rejected. *Alfonso v. Diamondhead Fire Prot. Dist.*, — So. 2d —, 2013 Miss. LEXIS 393 (Miss. Aug. 1, 2013).

TITLE 25
PUBLIC OFFICERS AND EMPLOYEES; PUBLIC
RECORDS

CHAPTER 7

Fees

§ 25-7-27. Marshals and constables.

JUDICIAL DECISIONS

1. Payment of fee.

Since the constable had shown only an expectation of continuing to collect fees prior to the court receiving funds in case, defendants were not liable to pay the constable service of process fees up front

and the Constable failed to show deprivation of a right security by the constitution or a violation of 42 U.S.C.S. § 1983. *Bailey v. Jefferson County*, — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 69050 (S.D. Miss. May 15, 2013).

TITLE 27

TAXATION AND FINANCE

Chapter 65. Sales Tax	27-65-1
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CHAPTER 65

Sales Tax

Municipal Special Sales Tax	27-65-241
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MUNICIPAL SPECIAL SALES TAX

SEC.	
27-65-241.	Certain municipalities authorized to impose special sales tax on persons engaging in business in municipality; exemptions; voter approval required before levying tax; authorized use of tax proceeds; establishment of commission; expenditure of special tax revenue to be in accordance with master plan; establishment of master plan [For conditional repeal date of this section, see subsection (8) as amended by Chapter 483, Laws of 2011].

§ 27-65-241. Certain municipalities authorized to impose special sales tax on persons engaging in business in municipality; exemptions; voter approval required before levying tax; authorized use of tax proceeds; establishment of commission; expenditure of special tax revenue to be in accordance with master plan; establishment of master plan [For conditional repeal date of this section, see subsection (8) as amended by Chapter 483, Laws of 2011].

(1) As used in this section, the following terms shall have the meanings ascribed to them in this section unless otherwise clearly indicated by the context in which they are used:

(a) “Hotel” or “motel” means and includes a place of lodging that at any one time will accommodate transient guests on a daily or weekly basis and that is known to the trade as such. Such terms shall not include a place of lodging with ten (10) or less rental units.

(b) “Municipality” means any municipality in the State of Mississippi with a population of one hundred fifty thousand (150,000) or more according to the most recent federal decennial census.

(c) “Restaurant” means and includes all places where prepared food is sold and whose annual gross proceeds of sales or gross income for the preceding calendar year equals or exceeds One Hundred Thousand Dollars (\$100,000.00). The term “restaurant” shall not include any nonprofit organization that is exempt from federal income taxation under Section 501(c)(3) of the Internal Revenue Code. For the purpose of calculating gross proceeds

of sales or gross income, the sales or income of all establishments owned, operated or controlled by the same person, persons or corporation shall be aggregated.

(2)(a) Subject to the provisions of this section, the governing authorities of a municipality may impose upon all persons as a privilege for engaging or continuing in business or doing business within such municipality, a special sales tax at the rate of not more than one percent (1%) of the gross proceeds of sales or gross income of the business, as the case may be, derived from any of the activities taxed at the rate of seven percent (7%) or more under the Mississippi Sales Tax Law, Section 27-65-1 et seq.

(b) The tax levied under this section shall apply to every person making sales, delivery or installations of tangible personal property or services within the municipality but shall not apply to:

(i) Sales exempted by Sections 27-65-19, 27-65-101, 27-65-103, 27-65-105, 27-65-107, 27-65-109 and 27-65-111 of the Mississippi Sales Tax Law;

(ii) Gross proceeds of sales or gross income of restaurants derived from the sale of food and beverages;

(iii) Gross proceeds of sales or gross income of hotels and motels derived from the sale of hotel rooms and motel rooms for lodging purposes;

(iv) Retail sales of food for human consumption not purchased with food stamps issued by the United States Department of Agriculture, or other federal agency, but which would be exempt under Section 27-65-111(o) from the taxes imposed by this chapter if the food items were purchased with food stamps; and

(v) Gross income of businesses engaging or continuing in the business of TV cable systems, subscription TV services, and other similar activities, including, but not limited to, cable Internet services.

(3)(a) Before any tax authorized under this section may be imposed, the governing authorities of the municipality shall adopt a resolution declaring its intention to levy the tax, setting forth the amount of the tax to be imposed, the purposes for which the revenue collected pursuant to the tax levy may be used and expended, the date upon which the tax shall become effective, the date upon which the tax shall be repealed, and calling for an election to be held on the question. The date of the election shall be set in the resolution. Notice of the election shall be published once each week for at least three (3) consecutive weeks in a newspaper published or having a general circulation in the municipality, with the first publication of the notice to be made not less than twenty-one (21) days before the date fixed in the resolution for the election and the last publication to be made not more than seven (7) days before the election. At the election, all qualified electors of the municipality may vote. The ballots used at the election shall have printed thereon a brief description of the sales tax, the amount of the sales tax levy, a description of the purposes for which the tax revenue may be used and expended and the words "FOR THE LOCAL SALES TAX" and "AGAINST THE LOCAL SALES TAX" and the voter shall vote by placing a cross (X) or check mark (✓) opposite his choice on the proposition. When the

results of the election have been canvassed by the election commissioners of the municipality and certified by them to the governing authorities, it shall be the duty of such governing authorities to determine and adjudicate whether at least three-fifths (¾) of the qualified electors who voted in the election voted in favor of the tax. If at least three-fifths (¾) of the qualified electors who voted in the election voted in favor of the tax, the governing authorities shall adopt a resolution declaring the levy and collection of the tax provided in this section and shall set the first day of the second month following the date of such adoption as the effective date of the tax levy. A certified copy of this resolution, together with the result of the election, shall be furnished to the Department of Revenue not less than thirty (30) days before the effective date of the levy.

(b) A municipality shall not hold more than two (2) elections under this subsection.

(4) The revenue collected pursuant to the tax levy imposed under this section may be expended to pay the cost of road and street repair, reconstruction and resurfacing projects based on traffic patterns, need and usage, and to pay the costs of water, sewer and drainage projects in accordance with a master plan adopted by the commission established pursuant to subsection (7).

(5)(a) The special sales tax authorized by this section shall be collected by the Department of Revenue, shall be accounted for separately from the amount of sales tax collected for the state in the municipality and shall be paid to the municipality. The Department of Revenue may retain one percent (1%) of the proceeds of such tax for the purpose of defraying the costs incurred by the department in the collection of the tax. Payments to the municipality shall be made by the Department of Revenue on or before the fifteenth day of the month following the month in which the tax was collected.

(b) The proceeds of the special sales tax shall be placed into a special municipal fund apart from the municipal general fund and any other funds of the municipality, and shall be expended by the municipality solely for the purposes authorized in subsection (4) of this section. The records reflecting the receipts and expenditures of the revenue from the special sales tax shall be audited annually by an independent certified public accountant. The accountant shall make a report of his findings to the governing authorities of the municipality and file a copy of his report with the Secretary of the Senate and the Clerk of the House of Representatives. The audit shall be made and completed as soon as practical after the close of the fiscal year of the municipality, and expenses of the audit shall be paid from the funds derived by the municipality pursuant to this section.

(c) All provisions of the Mississippi Sales Tax Law applicable to filing of returns, discounts to the taxpayer, remittances to the Department of Revenue, enforced collection, rights of taxpayers, recovery of improper taxes, refunds of overpaid taxes or other provisions of law providing for imposition and collection of the state sales tax shall apply to the special sales tax authorized by this section, except where there is a conflict, in which case the

provisions of this section shall control. Any damages, penalties or interest collected for the nonpayment of taxes imposed under this section, or for noncompliance with the provisions of this section, shall be paid to the municipality on the same basis and in the same manner as the tax proceeds. Any overpayment of tax for any reason that has been disbursed to a municipality or any payment of the tax to a municipality in error may be adjusted by the Department of Revenue on any subsequent payment to the municipality pursuant to the provisions of the Mississippi Sales Tax Law. The Department of Revenue may, from time to time, make such rules and regulations not inconsistent with this section as may be deemed necessary to carry out the provisions of this section, and such rules and regulations shall have the full force and effect of law.

(6) If a municipality expands its corporate boundaries, the governing authorities of the municipality may not impose the special sales tax in the annexed area unless the tax is approved at an election conducted, as far as is practicable, in the manner provided in subsection (3) of this section, except that only qualified electors in the annexed area may vote in the election.

(7)(a) Any municipality that levies the special sales tax authorized under this section shall establish a commission as provided for in this section. Expenditures of revenue from the special sales tax authorized by this section shall be in accordance with a master plan adopted by the commission pursuant to this subsection.

(b) The commission shall be composed of ten (10) voting members who shall be known as commissioners appointed as follows:

(i) Four (4) members representing the business community in the municipality appointed by the local chamber of commerce for initial terms of one (1), two (2), four (4) and five (5) years respectively. The members appointed pursuant to this paragraph shall be persons who represent businesses located within the city limits of the municipality.

(ii) Three (3) members shall be appointed at large by the mayor of the municipality, with the advice and consent of the legislative body of the municipality, for initial terms of two (2), three (3) and four (4) years respectively. All appointments made by the mayor pursuant to this paragraph shall be residents of the municipality.

(iii) One (1) member shall be appointed at large by the Governor for an initial term of four (4) years. All appointments made by the Governor pursuant to this paragraph shall be residents of the municipality.

(iv) One (1) member shall be appointed at large by the Lieutenant Governor for an initial term of four (4) years. All appointments made by the Lieutenant Governor pursuant to this paragraph shall be residents of the municipality.

(v) One (1) member shall be appointed at large by the Speaker of the House of Representatives for a term of four (4) years. All appointments made by the Speaker of the House of Representatives pursuant to this paragraph shall be residents of the municipality.

(c) The terms of all appointments made subsequent to the initial appointment shall be made for five (5) years. Any vacancy which may occur

shall be filled in the same manner as the original appointment and shall be made for the unexpired term. Each member of the commission shall serve until his successor is appointed and qualified.

(d) The mayor of the municipality shall designate a chairman of the commission from among the membership of the commission. The vice chairman and secretary shall be elected by the commission from among the membership of the commission for a term of two (2) years. The vice chairman and secretary may be reelected, and the chairman may be reappointed.

(e) The commissioners shall serve without compensation.

(f) Any commissioner shall be disqualified and shall be removed from office for either of the following reasons:

(i) Conviction of a felony in any state court or in federal court; or

(ii) Failure to attend three (3) consecutive meetings without just cause.

If a commissioner is removed for any of the above reasons, the vacancy shall be filled in the manner prescribed in this section and shall be made for the unexpired term.

(g) A quorum shall consist of six (6) voting members of the commission. The commission shall adopt such rules and regulations as may govern the time and place for holding meetings, regular and special.

(h) The commission shall, with input from the municipality, establish a master plan for road and street repair, reconstruction and resurfacing projects based on traffic patterns, need and usage, and for water, sewer and drainage projects. Expenditures of the revenue from the tax authorized to be imposed pursuant to this section shall be made at the discretion of the governing authorities of the municipality if the expenditures comply with the master plan. The commission shall monitor the compliance of the municipality with the master plan.

(8) This section shall stand repealed from and after July 1, 2032; however, if the tax fails to be adopted at an election held for such purpose prior to July 1, 2014, this section shall stand repealed from and after July 1, 2014.

SOURCES: Laws, 2009, ch. 328, § 1; Laws, 2011, ch. 483, § 1, eff May 29, 2012 (the date the United States Attorney General interposed no objection under Section 5 of the Voting Rights Act of 1965, to the amendment of this section.)

Editor's Note — Chapter 483, Laws of 2011, was submitted to the United States Attorney General for preclearance under Section 5 of the Voting Rights Act. The United States Attorney General responded in a letter dated May 29, 2012, and interposed no objection to the substantive provisions of Chapter 483. The letter also said that certain other changes made by Chapter 483 were not yet capable of administration and therefore were not ripe for review by the United States Attorney General, but the State must seek review of those provisions under Section 5 after they have been implemented. The United States Supreme Court, in the case of *Shelby County v. Holder* (June 25, 2013), struck down the coverage formula that determined what jurisdictions are subject to Section 5 of the Voting Rights Act, so the coverage formula can no longer be used as a basis for subjecting jurisdictions to preclearance under Section 5. Because of the *Shelby County* decision, the United States Attorney General is not making any

determinations under Section 5 on voting or election changes made by states. Accordingly, those other provisions of Chapter 483 do not have to be submitted for preclearance, and all of Chapter 483 is now in effect.

TITLE 31

PUBLIC BUSINESS, BONDS AND OBLIGATIONS

CHAPTER 3

State Board of Public Contractors

§ 31-3-15. Certificates of responsibility required for bid.

JUDICIAL DECISIONS

1. In general.

Although appellant's construction contract with appellee was void due to appellant's failure to obtain a certificate of responsibility, as appellee knew appellant lacked the certificate but solicited it to

enter into the illegal contract, appellant was not barred from recovery under theories of unjust enrichment or quantum meruit. *Ground Control, Llc v. Capsco Indus.*, — So. 2d —, 2013 Miss. LEXIS 327 (Miss. June 6, 2013).

§ 31-3-21. Bidding and awards.

JUDICIAL DECISIONS

2. Illustrative cases.

Though appellant's competitor, a Mississippi company, had not been entitled to a statutory preference since Alabama treated nonresident contractors in the same manner that Mississippi treated nonresident contractors, because the com-

petitor's residence played only a minor part in the school board's decision to award the contract to the competitor, the award was not disturbed on appeal. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 2d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

CHAPTER 7

Public Purchases

IN GENERAL

§ 31-7-13. Bid requirements and exceptions; public auctions.

JUDICIAL DECISIONS

2. Factors considered.

That appellant's suppliers were protected by a payment bond given under Miss. Code Ann. § 85-7-185 did not preclude a school board, which awarded the contract to the next lowest bidder, from considering appellant's prior payment disputes with suppliers. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 2d —,

2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

School board's award of contract to appellant's competitor, though appellant was the lowest bidder, was not arbitrary or capricious, because the board was not statutorily obligated to accept the lowest bid, and the bid documents stated that the board could award a contract to an entity

other than the lowest bidder if it determined it was "best" to do so. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, —

So. 2d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

§ 31-7-47. Preference to resident contractors.

JUDICIAL DECISIONS

2. Illustrative cases.

Though appellant's competitor, a Mississippi company, had not been entitled to a statutory preference since Alabama treated nonresident contractors in the same manner that Mississippi treated nonresident contractors, because the com-

petitor's residence played only a minor part in the school board's decision to award the contract to the competitor, the award was not disturbed on appeal. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 2d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

TITLE 37

EDUCATION

CHAPTER 9

District Superintendents, Principals, Teachers, and Other Employees

IN GENERAL

§ 37-9-59. Grounds and procedure for dismissal or suspension of licensed employee; attendance of different school system by child as ground for denying employment or reemployment of superintendent, principal or licensed employee.

JUDICIAL DECISIONS

1. Suspension and removal—In general.
3. —Principals.
4. —Teachers — In general.
5. — —Insubordination or other good cause.

1. Suspension and removal—In general.

3. —Principals.

Good cause supported a principal's termination because the principal knew the school could not buy a fairway mower, yet the principal executed a document purporting to give a high school coach the authority to make such a purchase on the school's behalf, which exceeded the principal's authority and enabled a serious vio-

lation of the school board's purchasing policy. *Hester v. Lowndes County Sch. Dist.*, — So. 2d —, 2013 Miss. App. LEXIS 509 (Miss. Ct. App. Aug. 20, 2013).

4. —Teachers — In general.

5. — —Insubordination or other good cause.

Good cause existed for termination of a high school coach because he wrongfully exposed a school district to potential liability in a lease/purchase agreement for a fairway mower when he entered the agreement as a purported agent for the school. *Hester v. Lowndes County Sch. Dist.*, — So. 2d —, 2013 Miss. App. LEXIS 509 (Miss. Ct. App. Aug. 20, 2013).

§ 37-9-69. General duties of superintendents, principals and teachers.

JUDICIAL DECISIONS

2.5. Duty to protect from bullying.

Miss. Code Ann. § 37-9-69 applied to alleged ministerial acts of negligent failure to enforce school district policies, failure to respond to a student's bullying by other students, and failure to discipline those bullies, thus, Miss. Cod Ann. § 11-

46-9(1)(a), (d)'s discretionary immunity did not bar those claims; finding that the alleged conduct was ministerial rather than discretionary did not remove the absolute personal immunity afforded the individual officials for actions committed within the course and scope of employ-

ment. R.S. v. Starkville Sch. Dist., — F. Supp. 2d —, 2013 U.S. Dist. LEXIS 134264 (N.D. Miss. Sept. 19, 2013).

EDUCATION EMPLOYMENT PROCEDURES LAW

§ 37-9-111. Hearing.

JUDICIAL DECISIONS

7. Miscellaneous.

Since a teacher only filed complaints for original actions, and since the chancery court possessed only appellate jurisdiction, then the chancery court lacked subject-matter jurisdiction; the teacher failed

to file her appeal of the school board's decision in chancery court in accordance with statutory requirements. *Lacour v. Claiborne County Sch. Dist.*, — So. 2d —, 2013 Miss. App. LEXIS 481 (Miss. Ct. App. Aug. 6, 2013).

§ 37-9-113. Judicial review.

JUDICIAL DECISIONS

2. Scope of appeal; jurisdiction.

Since a teacher only filed complaints for original actions, and since the chancery court possessed only appellate jurisdiction, then the chancery court lacked subject-matter jurisdiction; the teacher failed to file her appeal of the school board's decision in chancery court in accordance with statutory requirements. *Lacour v. Claiborne County Sch. Dist.*, — So. 2d —, 2013 Miss. App. LEXIS 481 (Miss. Ct. App. Aug. 6, 2013).

Chancery court properly concluded that a teacher's claim for relief was barred by the statute of limitations; since the teacher failed to properly perfect in chancery court an appeal of the school district's decision affirming her termination, and since she failed to obtain federal ancillary

jurisdiction over her state-law claim, then no tolling of the statute of limitations occurred with respect to that state-law right of appeal. *Lacour v. Claiborne County Sch. Dist.*, — So. 2d —, 2013 Miss. App. LEXIS 481 (Miss. Ct. App. Aug. 6, 2013).

Chancery court correctly determined that it lacked subject matter jurisdiction because the teacher failed to file her appeal of the school board's decision affirming her termination in accordance with statutory requirements; failure to properly perfect the appeal barred the chancery court's jurisdiction. *Lacour v. Claiborne County Sch. Dist.*, — So. 2d —, 2013 Miss. App. LEXIS 481 (Miss. Ct. App. Aug. 6, 2013).

TITLE 41

PUBLIC HEALTH

Chapter 7.	Hospital and Health Care Commissions	41-7-1
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CHAPTER 7

Hospital and Health Care Commissions

Health Care Certificate of Need Law of 1979	41-7-171
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HEALTH CARE CERTIFICATE OF NEED LAW OF 1979

SEC.

41-7-201.	Direct appeal of final order pertaining to certificate of need to the Mississippi Supreme Court.
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§ 41-7-201. Direct appeal of final order pertaining to certificate of need to the Mississippi Supreme Court.

The provisions of this section shall apply to any party appealing any final order of the State Department of Health pertaining to a certificate of need for any health care facility as defined in Section 41-7-173(h):

(a) There shall be a “stay of proceedings” of any final order issued by the State Department of Health pertaining to the issuance of a certificate of need for the establishment, construction, expansion or replacement of a health care facility for a period of thirty (30) days from the date of the order, if an existing provider located in the same service area where the health care facility is or will be located has requested a hearing during the course of review in opposition to the issuance of the certificate of need. The stay of proceedings shall expire at the termination of thirty (30) days; however, no construction, renovation or other capital expenditure that is the subject of the order shall be undertaken, no license to operate any facility that is the subject of the order shall be issued by the licensing agency, and no certification to participate in the Title XVIII or Title XIX programs of the Social Security Act shall be granted, until all statutory appeals have been exhausted or the time for those appeals has expired. Notwithstanding the foregoing, the filing of an appeal from a final order of the State Department of Health for the issuance of a certificate of need shall not prevent the purchase of medical equipment or development or offering of institutional health services granted in a certificate of need issued by the State Department of Health.

(b) In addition to other remedies now available at law or in equity, any party aggrieved by any such final order of the State Department of Health shall have the right of direct appeal to the Mississippi Supreme Court, which appeal must be filed within twenty (20) days after the date of the final order.

Any appeal shall state briefly the nature of the proceedings before the State Department of Health and shall specify the order complained of.

(c) Upon the filing of such an appeal, the Clerk of the Supreme Court shall serve notice thereof upon the State Department of Health, whereupon the State Department of Health shall, within thirty (30) days of the date of the filing of the appeal, certify to the court the record in the case, which records shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; however, the parties and the State Department of Health may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

(d) Any appeal of a final order by the State Department of Health in a certificate of need proceeding shall require the giving of a bond by the appellant(s) sufficient to secure the appellee against the loss of costs, fees, expenses and attorney's fees incurred in defense of the appeal, approved by the Supreme Court within five (5) days of the date of filing the appeal.

(e) No new or additional evidence shall be introduced in the Supreme Court, but the case shall be determined upon the record certified to the court.

(f) The Supreme Court may sustain or dismiss the appeal, modify or vacate the order complained of, in whole or in part, and may make an award of costs, fees, expenses and attorney's fees, as the case may be; but in case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the State Department of Health for any further proceedings, not inconsistent with the court's order, as, in the opinion of the court, justice may require. The court, as part of the final order, shall make an award of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) if the court affirms the order of the State Department of Health. The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal.

(g) Within thirty (30) days from the date of a final order by the Supreme Court that modifies or wholly or partly vacates the final order of the State Department of Health granting a certificate of need, the State Department of Health shall issue another order in conformity with the final order of the Supreme Court.

SOURCES: Laws, 1979, ch. 451, § 16; Laws, 1983, ch. 484, § 8; Laws, 1985, ch. 534, § 11; Laws, 1986, ch. 437, § 44; Laws, 1992, ch. 512 § 1; Laws, 1999, ch. 583, § 3; Laws, 2011, ch. 540, § 1, eff from and after July 1, 2011.

Editor's Note — This section, as amended by Section 1 of Chapter 540, Laws of 2011, effective from and after July 1, 2011, was held unconstitutional by the Mississippi Supreme Court in *Dialysis Solutions, LLC v. Miss. State Dep't of Health*, 96 So. 3d 713 (Miss. 2012). The section as amended in 2011 is published here as there has been no

legislative action taken to change the law since the court's decision. The text of the section in effect prior to the 2011 amendment is quoted below:

“(1) The provisions of this subsection (1) shall apply to any party appealing any final order of the State Department of Health pertaining to a certificate of need for a home health agency, as defined in Section 41-7-173(h)(ix):

“(a) In addition to other remedies now available at law or in equity, any party aggrieved by any such final order of the State Department of Health shall have the right of appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi, which appeal must be filed within thirty (30) days after the date of the final order. Provided, however, that any appeal of an order disapproving an application for such a certificate of need may be made to the chancery court of the county where the proposed construction, expansion or alteration was to be located or the new service or purpose of the capital expenditure was to be located. Such appeal must be filed in accordance with the thirty (30) days for filing as heretofore provided. Any appeal shall state briefly the nature of the proceedings before the State Department of Health and shall specify the order complained of. Any person whose rights may be materially affected by the action of the State Department of Health may appear and become a party or the court may, upon motion, order that any such person, organization or entity be joined as a necessary party.

“(b) Upon the filing of such an appeal, the clerk of the chancery court shall serve notice thereof upon the State Department of Health, whereupon the State Department of Health shall, within fifty (50) days or within such additional time as the court may by order for cause allow from the service of such notice, certify to the chancery court the record in the case, which records shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided, however, that the parties and the State Department of Health may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal.

“(c) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record certified to the court.

“(d) The court may dispose of the appeal in termtime or vacation and may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part as the case may be; but in case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the State Department of Health for such further proceedings, not inconsistent with the court's order, as, in the opinion of the court, justice may require. The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal. Provided, however, an order of the chancery court reversing the denial of a certificate of need by the State Department of Health shall not entitle the applicant to effectuate the certificate of need until either:

“(i) Such order of the chancery court has become final and has not been appealed to the Supreme Court; or

“(ii) The Supreme Court has entered a final order affirming the chancery court.

“(e) Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

“(2) The provisions of this subsection (2) shall apply to any party appealing any final order of the State Department of Health pertaining to a certificate of need for any health-care facility as defined in Section 41-7-173(h), with the exception of any home health agency as defined in Section 41-7-173(h)(ix):

“(a) There shall be a “stay of proceedings” of any final order issued by the State Department of Health pertaining to the issuance of a certificate of need for the establishment, construction, expansion or replacement of a health-care facility for a

period of thirty (30) days from the date of the order, if an existing provider located in the same service area where the health-care facility is or will be located has requested a hearing during the course of review in opposition to the issuance of the certificate of need. The stay of proceedings shall expire at the termination of thirty (30) days; however, no construction, renovation or other capital expenditure that is the subject of the order shall be undertaken, no license to operate any facility that is the subject of the order shall be issued by the licensing agency, and no certification to participate in the Title XVIII or Title XIX programs of the Social Security Act shall be granted, until all statutory appeals have been exhausted or the time for such appeals has expired. Notwithstanding the foregoing, the filing of an appeal from a final order of the State Department of Health or the chancery court for the issuance of a certificate of need shall not prevent the purchase of medical equipment or development or offering of institutional health services granted in a certificate of need issued by the State Department of Health.

“(b) In addition to other remedies now available at law or in equity, any party aggrieved by any such final order of the State Department of Health shall have the right of appeal to the Chancery Court of the First Judicial District of Hinds County, Mississippi, which appeal must be filed within twenty (20) days after the date of the final order. Provided, however, that any appeal of an order disapproving an application for such a certificate of need may be made to the chancery court of the county where the proposed construction, expansion or alteration was to be located or the new service or purpose of the capital expenditure was to be located. Such appeal must be filed in accordance with the twenty (20) days for filing as heretofore provided. Any appeal shall state briefly the nature of the proceedings before the State Department of Health and shall specify the order complained of.

“(c) Upon the filing of such an appeal, the clerk of the chancery court shall serve notice thereof upon the State Department of Health, whereupon the State Department of Health shall, within thirty (30) days of the date of the filing of the appeal, certify to the chancery court the record in the case, which records shall include a transcript of all testimony, together with all exhibits or copies thereof, all pleadings, proceedings, orders, findings and opinions entered in the case; provided, however, that the parties and the State Department of Health may stipulate that a specified portion only of the record shall be certified to the court as the record on appeal. The chancery court shall give preference to any such appeal from a final order by the State Department of Health in a certificate of need proceeding, and shall render a final order regarding such appeal no later than one hundred twenty (120) days from the date of the final order by the State Department of Health. If the chancery court has not rendered a final order within this 120-day period, then the final order of the State Department of Health shall be deemed to have been affirmed by the chancery court, and any party to the appeal shall have the right to appeal from the chancery court to the Supreme Court on the record certified by the State Department of Health as otherwise provided in paragraph (g) of this subsection. In the event the chancery court has not rendered a final order within the 120-day period and an appeal is made to the Supreme Court as provided herein, the Supreme Court shall remand the case to the chancery court to make an award of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) should the Supreme Court affirm the order of the State Department of Health.

“(d) Any appeal of a final order by the State Department of Health in a certificate of need proceeding shall require the giving of a bond by the appellant(s) sufficient to secure the appellee against the loss of costs, fees, expenses and attorney's fees incurred in defense of the appeal, approved by the chancery court within five (5) days of the date of filing the appeal.

“(e) No new or additional evidence shall be introduced in the chancery court but the case shall be determined upon the record certified to the court.

“(f) The court may dispose of the appeal in termtime or vacation and may sustain or dismiss the appeal, modify or vacate the order complained of in whole or in part and

may make an award of costs, fees, expenses and attorney's fees, as the case may be; but in case the order is wholly or partly vacated, the court may also, in its discretion, remand the matter to the State Department of Health for such further proceedings, not inconsistent with the court's order, as, in the opinion of the court, justice may require. The court, as part of the final order, shall make an award of costs, fees, reasonable expenses and attorney's fees incurred in favor of appellee payable by the appellant(s) should the court affirm the order of the State Department of Health. The order shall not be vacated or set aside, either in whole or in part, except for errors of law, unless the court finds that the order of the State Department of Health is not supported by substantial evidence, is contrary to the manifest weight of the evidence, is in excess of the statutory authority or jurisdiction of the State Department of Health, or violates any vested constitutional rights of any party involved in the appeal. Provided, however, an order of the chancery court reversing the denial of a certificate of need by the State Department of Health shall not entitle the applicant to effectuate the certificate of need until either:

“(i) Such order of the chancery court has become final and has not been appealed to the Supreme Court; or

“(ii) The Supreme Court has entered a final order affirming the chancery court.

“(g) Appeals in accordance with law may be had to the Supreme Court of the State of Mississippi from any final judgment of the chancery court.

“(h) Within thirty (30) days from the date of a final order by the Supreme Court or a final order of the chancery court not appealed to the Supreme Court that modifies or wholly or partly vacates the final order of the State Department of Health granting a certificate of need, the State Department of Health shall issue another order in conformity with the final order of the Supreme Court, or the final order of the chancery court not appealed to the Supreme Court.”

JUDICIAL DECISIONS

1.5. Constitutionality.

Miss. Code Ann. § 41-7-201, purporting to allow a health care provider to appeal the Mississippi State Department of Health's (MDH) denial of the provider's application for a certificate of need directly to the supreme court, violated Miss. Const. Art. VI, § 146 because the statute impermissibly conferred original jurisdiction on the supreme court, as, (1) under Miss. Const. Art. I, §§ 1 - 2, the legislature could not confer jurisdiction on courts not given or authorized to be given by the Mississippi Constitution, (2) the “revisory” appellate jurisdiction conferred on the supreme court in Miss. Const. Art. VI,

§ 146 applied only to judicial decisions rendered by a tribunal clothed with judicial power, (3) no certificate of need procedure existed at common law, (4) the nature of a certificate of need proceeding was permit-like and often nonadversarial, and (5) the final order of the MDH was issued by the State Health Officer, who was not statutorily required to be an attorney, under Miss. Code Ann. § 41-3-5.1, so the MDH lacked the indicia to be considered a tribunal of the character from which the legislature was authorized to grant appeals directly to the supreme court. *Dialysis Solutions, LLC v. Miss. State Dep't of Health*, 96 So. 3d 713 (Miss. 2012).

CHAPTER 29

Poisons, Drugs and Other Controlled Substances

ARTICLE 3.

UNIFORM CONTROLLED SUBSTANCES LAW.

§ 41-29-139. Prohibited acts; penalties.

JUDICIAL DECISIONS

IV. EVIDENCE.

22. Sufficient evidence—possession.
23. —Sale or distribution, or intent as to same.

IV. EVIDENCE.

22. Sufficient evidence—possession.
23. —Sale or distribution, or intent as to same.

Defendant's conviction for selling cocaine in violation of this section was not

against the weight of the evidence because a confidential informant testified that he purchased cocaine from defendant and his testimony was corroborated by testimony of police officers; although the audio and video tapes of their meeting did not explicitly refer to drugs or show an exchange, the informant possessed an amount of cocaine afterwards that he did not have prior to his meeting with defendant. *Wallace v. State*, — So. 2d —, 2013 Miss. App. LEXIS 627 (Miss. Ct. App. Sept. 24, 2013).

§ 41-29-153. Forfeitures.

JUDICIAL DECISIONS

4. Proximity presumption.

Forfeiture of money was not grossly disproportionate to the amount of marijuana that was found in a vehicle because the value of the illegal drugs involved would have been approximately equal to the value of the money; through the statutory presumption and other evidence, the money was shown to either be the proceeds of a recent drug sale or to be intended for the purchase of drugs. *Twenty Thousand Eight Hundred Dollars \$20,800.00 In U.S. Currency v. State Ex Rel. Miss. Bureau of Narcotics*, — So. 2d —, 2013 Miss. App. LEXIS 326 (Miss. Ct. App. June 4, 2013).

Trial court did not err in applying the presumption contained in subsection (a)(7), and claimants did not rebut the presumption because money was found in bundles on a claimant's person, in a suitcase in the back seat of a vehicle, and in the center console, and claimants had no documentation for the cash; claimants had tattoos that were associated with a gang known for drug trafficking, and the trial court did not find their testimony credible. *Twenty Thousand Eight Hundred Dollars \$20,800.00 In U.S. Currency v. State Ex Rel. Miss. Bureau of Narcotics*, — So. 2d —, 2013 Miss. App. LEXIS 326 (Miss. Ct. App. June 4, 2013).

TITLE 43

PUBLIC WELFARE

CHAPTER 19

Support of Natural Children

CHILD SUPPORT UNIT

§ 43-19-33. Force and effect of written stipulated agreement to support and written admission of paternity containing agreement of support.

JUDICIAL DECISIONS

1. In general.

Chancery court did not abuse its discretion by declining to require a parent to provide post-majority financial support for the parent's child because Mississippi

law did not vest the court with the authority to mandate that parents financially support their offspring post-majority. *Hays v. Alexander*, — So. 2d —, 2013 Miss. LEXIS 324 (Miss. June 6, 2013).

CHILD SUPPORT AWARD GUIDELINES

§ 43-19-101. Child support award guidelines.

JUDICIAL DECISIONS

4. Findings of fact.

6. Modification of support.

4. Findings of fact.

In calculating child support, the trial court abused its discretion in attributing any future rental income to the husband, as it had awarded the rental property to the wife. *Collins v. Collins*, — So. 2d —, 2013 Miss. LEXIS 285 (Miss. May 9, 2013).

In calculating child support, the trial court erred in arbitrarily determining a husband's monthly income to exclusion of the undisputed evidence he provided, due to his failure to comply with Miss. Unif. Ch. Ct. R. 8.05, because the remedy for his violation was to hold him in contempt, not to disregard the credible evidence he provided. *Collins v. Collins*, — So. 2d —, 2013 Miss. LEXIS 285 (Miss. May 9, 2013).

6. Modification of support.

In determining a father's child support obligation upon granting an upward modi-

fication, the trial court properly gave him a credit for taxes, which amounted to a deduction from his monthly gross income, as well as other credits for support paid to his other children and payments for health insurance for all of his children. *Williams v. Dep't of Human Servs.*, — So. 2d —, 2013 Miss. App. LEXIS 370 (Miss. Ct. App. June 18, 2013).

Trial court properly calculated the father's adjusted gross income for purposes of an upward modification of his child-support payment, as the inclusion of his overtime pay was proper where it was reasonable to anticipate that he would receive overtime wages in the future, and other appropriate deductions were made. *Williams v. Dep't of Human Servs.*, — So. 2d —, 2013 Miss. App. LEXIS 370 (Miss. Ct. App. June 18, 2013).

CHAPTER 21

Youth Court

RECORDS

§ 43-21-251. Court records.

JUDICIAL DECISIONS

I. Under Current Law.

1. In general.
- 2.-3. [Reserved for future use.]

I. Under Current Law.

1. In general.

Youth court erred by imposing a gag order in a child custody proceeding because it failed to consider any balancing test before imposing the gag order, thus, there existed no imminent danger to a compelling interest of such magnitude that the restraint on the parties' speech was warranted. *Cruz v. Jackson County, Dep't of Human Servs.* (in the Interest of R.J.M.B.), — So. 2d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

Issue of confidentiality of youth court records was not moot because a federal

court did not seal its records since Miss. Code Ann. § 43-21-261 still had the effect of limiting the public's ability to view, copy, or otherwise disseminate the youth-court records for any other reason. *Cruz v. Jackson County, Dep't of Human Servs.* (in the Interest of R.J.M.B.), — So. 2d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

Youth court did not abuse its discretion in ordering that the youth court records in a child custody proceeding remain confidential because the mother could not expressly waive record confidentiality just because she was a parent. *Cruz v. Jackson County, Dep't of Human Servs.* (in the Interest of R.J.M.B.), — So. 2d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

2.-3. [Reserved for future use.]

§ 43-21-261. Disclosure of records.

JUDICIAL DECISIONS

3. Right to records.

Youth court erred by imposing a gag order in a child custody proceeding because it failed to consider any balancing test before imposing the gag order, thus, there existed no imminent danger to a compelling interest of such magnitude that the restraint on the parties' speech was warranted. *Cruz v. Jackson County, Dep't of Human Servs.* (in the Interest of R.J.M.B.), — So. 2d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

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Youth court did not abuse its discretion in ordering that the youth court records in a child custody proceeding remain confidential because the mother could not expressly waive record confidentiality just because she was a parent. *Cruz v. Jackson County, Dep't of Human Servs.* (in the Interest of R.J.M.B.), — So. 2d —, 2013 Miss. LEXIS 305 (Miss. May 23, 2013).

CHAPTER 31

Poor Persons

§ 43-31-25. Certain relatives bound to support pauper; liability of deceased pauper's estate.

JUDICIAL DECISIONS

1. In general.

Chancery court did not abuse its discretion by declining to require a parent to provide post-majority financial support for the parent's child because Mississippi

law did not vest the court with the authority to mandate that parents financially support their offspring post-majority. *Hays v. Alexander*, — So. 2d —, 2013 Miss. LEXIS 324 (Miss. June 6, 2013).

TITLE 47

PRISONS AND PRISONERS; PROBATION AND PAROLE

CHAPTER 5

Correctional System

OFFENDERS

§ 47-5-139. Certain inmates ineligible for earned time allowance; commutation to be based on total term of sentences; forfeiture of earned time in event of escape.

JUDICIAL DECISIONS

2. Constitutional issues.

Where a juvenile convicted of murder receives a life sentence, conditional release does not satisfy the mandate of *Miller v. Alabama*, 2012 U.S. LEXIS 4873, because conditional release is more akin to clemency, which is different from parole

despite some surface similarities, and conditional release would not be determined by the sentencing authority at the time of sentencing based on age and other characteristics, as *Miller* mandates. *Parker v. State*, — So. 2d —, 2013 Miss. LEXIS 321 (Miss. June 6, 2013).

CHAPTER 7

Probation and Parole

PROBATION AND PAROLE LAW

§ 47-7-3. Parole of prisoners; conditions for eligibility; determination of tentative hearing date; reconsideration of rejected applications after one year on convictions for nonviolent crimes.

JUDICIAL DECISIONS

2. Constitutionality.

As defendant was 15 at the time of the murder and was statutorily ineligible for parole, and as *Miller v. Alabama*, 2012 U.S. LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the *Miller* factors before determining sentence. *Parker v. State*, — So. 2d —, 2013 Miss. LEXIS 321 (Miss. June 6, 2013).

Miss. Code Ann. § 47-7-3(1)(h) can constitutionally be applied to juveniles provided that the sentencing authority considers the factors of *Miller v. Alabama*, 2012 U.S. LEXIS 4873, in imposing the sentence. *Parker v. State*, — So. 2d —, 2013 Miss. LEXIS 321 (Miss. June 6, 2013).

TITLE 49
CONSERVATION AND ECOLOGY

Chapter 7.	Hunting and Fishing	49-7-1
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CHAPTER 7
Hunting and Fishing

In General.....	49-7-1
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IN GENERAL

SEC.
49-7-10. Repealed.

§ 49-7-10. Repealed.

Repealed by its own terms effective July 1, 2012.

§ 49-7-10. [Laws, 2010, ch. 384, § 1, eff from and after July 1, 2010.]

Editor's Note — Former § 49-7-10 permitted an owner of a pier in public or private waters to obtain an annual group pier fishing license.

A former § 49-7-10 [Laws, 1993, ch. 603, § 1; Repealed by Laws 1994, ch. 578, § 65, effective from and after July 1, 1994] related to marine water and saltwater licensing requirements. Similar provisions are found in § 49-15-313.

TITLE 53

OIL, GAS, AND OTHER MINERALS

CHAPTER 1

State Oil and Gas Board

IN GENERAL

§ 53-1-17. Powers of board.

JUDICIAL DECISIONS

- 3.5 State preemption.
- 5. Miscellaneous.

3.5 State preemption.

Forrest County Board of Supervisors had the authority to enact a fencing ordinance under the home rule statute and the ordinance was not preempted by state law since: (1) the Mississippi legislature had not expressly granted the Mississippi Oil and Gas Board (OGB) the exclusive authority to address industry safety issues; (2) the ordinance was not inconsistent with state oil and gas statutes and regulations; and (3) the OGB had not promulgated any regulation prohibiting perimeter fencing. *Delphi Oil, Inc. v. Forrest County Bd. of Supervisors*, — So. 2d —, 2013 Miss. LEXIS 326 (Miss. June 6, 2013).

5. Miscellaneous.

Forrest County fencing ordinance that required perimeter fencing around oil and gas facilities did not materially impede the Mississippi Oil and Gas Board's authority to make inspections of oil and gas sites and the requirement that the Mississippi State Oil and Gas supervisor and his representatives to have access to all wells drilled for oil and gas at any and all times in light of the public policy considerations of protecting private property and the health and safety of Forrest County citizens cited by the Forrest County Board of Supervisors in adopting the ordinance. *Delphi Oil, Inc. v. Forrest County Bd. of Supervisors*, — So. 2d —, 2013 Miss. LEXIS 326 (Miss. June 6, 2013).

§ 53-1-33. Supervisor and his representatives to have access to all wells.

JUDICIAL DECISIONS

- 1.-2. [Reserved for future use.]
- 3. Access not impeded.

1.-2. [Reserved for future use.]

3. Access not impeded.

Forrest County fencing ordinance that required perimeter fencing around oil and gas facilities did not materially impede the Mississippi Oil and Gas Board's authority to make inspections of oil and gas sites and the requirement that the Mississippi State Oil and Gas supervisor and his

representatives to have access to all wells drilled for oil and gas at any and all times in light of the public policy considerations of protecting private property and the health and safety of Forrest County citizens cited by the Forrest County Board of Supervisors in adopting the ordinance. *Delphi Oil, Inc. v. Forrest County Bd. of Supervisors*, — So. 2d —, 2013 Miss. LEXIS 326 (Miss. June 6, 2013).

TITLE 63

MOTOR VEHICLES AND TRAFFIC REGULATIONS

Chapter 21. Motor Vehicle Titles	63-21-1
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CHAPTER 3

Traffic Regulations and Rules of the Road

ARTICLE 25.

RECKLESS OR CARELESS DRIVING AND MISCELLANEOUS RULES.

§ 63-3-1213. Careless driving.

JUDICIAL DECISIONS

3. Probable cause.
5. Evidence sufficient.

3. Probable cause.

Testimony from the arresting officer that he observed defendant's truck pass so close to a deputy that the outside mirror could have struck the officer and that the truck then ran off the road provided sufficient probable cause for a traffic stop based on careless driving. *Ludwig v. State*, — So. 2d —, 2013 Miss. App. LEXIS 313 (Miss. Ct. App. June 4, 2013).

5. Evidence sufficient.

Evidence was sufficient to support defendant's convictions of running a red light and careless driving where a police officer testified that she observed defendant drive his entire vehicle over a concrete median and saw him run a red light. *Lobo v. City of Ridgeland*, — So. 2d —, 2013 Miss. App. LEXIS 300 (Miss. Ct. App. May 28, 2013).

CHAPTER 11

Implied Consent Law

§ 63-11-30. Operation of vehicle while under influence of intoxicating liquor or other substances impairing ability to operate vehicle or with blood alcohol concentrations above specified levels; penalties; granting of hardship driving privileges; concurrent running of suspensions; separate offense of endangering child by driving under influence; penalties.

JUDICIAL DECISIONS

9. Sufficiency of evidence.
14. Miscellaneous.

9. Sufficiency of evidence.

Sufficient evidence was presented to al-

low a reasonable and fair-minded juror to find that defendant operated a motor vehicle under circumstances indicating that he was impaired by alcohol because defendant testified that he had consumed alco-

hol on the day he was arrested, and the State presented testimony that several empty beer cans and a half-full beer can were found in his car and that he smelled like alcohol when he was pulled over. *Young v. State*, — So. 2d —, 2013 Miss. LEXIS 392 (Miss. Aug. 1, 2013).

There was not a sufficient factual basis, pursuant to Miss. Unif. Cir. & Cty. R. 8.04, to support defendant's guilty plea to driving under the influence (DUI) manslaughter and DUI mayhem because there was no factual basis that defendant had been driving in the county where the accident occurred, that defendant was impaired by controlled substances while defendant was driving, and that defendant performed a negligent act that caused one child's death and another child's serious bodily injury in an auto accident. *Porter v. State*, — So. 2d —, 2013 Miss. App. LEXIS 479 (Miss. Ct. App. Aug. 6, 2013).

Evidence supported defendant's driving under the influence conviction because defendant admitted to having been drinking, defendant's performance on field sobriety tests suggested that defendant was impaired, and a video of defendant at a police department waiting to take an Intoxilyzer breath exam depicted defendant as unsteady, eventually losing balance and falling off a stool, while defendant presented part of the video of what defendant alleged was a seizure, without any other support. *Carlson v. City of Ridgeland*, — So. 2d —, 2013 Miss. App. LEXIS 474 (Miss. Ct. App. Aug. 6, 2013).

Evidence was sufficient to support defendant's driving under the influence conviction where two police officers smelled alcohol emitting from defendant's vehicle, defendant exhibited physical signs of im-

pairment during field sobriety tests, and defendant refused to submit to an Intoxilyzer test, which was admissible pursuant to Miss. Code Ann. § 63-11-41. *Lobo v. City of Ridgeland*, — So. 2d —, 2013 Miss. App. LEXIS 300 (Miss. Ct. App. May 28, 2013).

Evidence was sufficient to convict defendant of DUI, first offense, even without the results of a breathalyzer test, where the arresting officer testified defendant admitted to drinking five alcoholic beverages, he smelled like alcohol, his speech was slurred, he swayed while standing, and his eyes were bloodshot and watery. *Ludwig v. State*, — So. 2d —, 2013 Miss. App. LEXIS 313 (Miss. Ct. App. June 4, 2013).

Trial court did not err in denying defendant's motion for judgment notwithstanding the verdict because ample evidence was offered in the form of testimony from the sole testifying witness, a police officer, with regard to defendant's condition on the morning in question; the officer's observations of defendant during the field-sobriety tests were ample proof that defendant's ability to operate her motor vehicle had been impaired by her admitted consumption of alcohol. *Huhn v. City of Brandon*, — So. 2d —, 2013 Miss. App. LEXIS 331 (Miss. Ct. App. June 4, 2013).

14. Miscellaneous.

County court did not apply an improper standard of law when convicting defendant of common-law driving under the influence because its determination of defendant's guilt was well-founded both on the law and the evidence. *Huhn v. City of Brandon*, — So. 2d —, 2013 Miss. App. LEXIS 331 (Miss. Ct. App. June 4, 2013).

§ 63-11-41. Admissibility in criminal prosecution of evidence of refusal to submit to chemical test.

JUDICIAL DECISIONS

1. In general.

Evidence was sufficient to support defendant's driving under the influence conviction where two police officers smelled alcohol emitting from defendant's vehicle,

defendant exhibited physical signs of impairment during field sobriety tests, and defendant refused to submit to an Intoxilyzer test, which was admissible pursuant to Miss. Code Ann. § 63-11-41.

Lobo v. City of Ridgeland, — So. 2d —,
2013 Miss. App. LEXIS 300 (Miss. Ct.
App. May 28, 2013).

CHAPTER 21

Motor Vehicle Titles

Article 2.	Procedures for Forfeiture of Vehicles Seized in Motor Vehicle Scrapping or Dismantling Violations	63-21-101
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ARTICLE 2.

PROCEDURES FOR FORFEITURE OF VEHICLES SEIZED IN MOTOR VEHICLE SCRAPPING OR DISMANTLING VIOLATIONS.

SEC.	
63-21-103.	Vehicles subject to seizure; notice of intent to forfeit seized vehicle; petition to contest forfeiture.

§ 63-21-103. Vehicles subject to seizure; notice of intent to forfeit seized vehicle; petition to contest forfeiture.

(1) When any vehicle, trailer or similar conveyance is used in the commission of a violation of Section 63-21-39, the vehicle, trailer or similar conveyance so used is subject to seizure by the applicable law enforcement agency and the vehicle, trailer or similar conveyance may be forfeited by the administrative forfeiture procedures provided for in Sections 63-21-101 through 63-21-107.

(2) The attorney for or any representative of the seizing law enforcement agency shall provide notice of intention to forfeit the seized vehicle, trailer or similar conveyance administratively, either by certified mail, return receipt requested, or by personal delivery, to all persons who are required to be notified pursuant to this section.

(3) In the event that notice of intention to forfeit the seized vehicle, trailer or similar conveyance administratively cannot be given as provided in subsection (2) of this section because of refusal, failure to claim, insufficient address or any other reason, the attorney for or representative of the seizing law enforcement agency shall provide notice by publication in a newspaper of general circulation in the county in which the seizure occurred for once a week for three (3) consecutive weeks.

(4) Notice pursuant to subsections (2) and (3) of this section shall include the following information:

- (a) A description of the vehicle, trailer or similar conveyance;
- (b) The approximate value of the vehicle, trailer or similar conveyance;
- (c) The date and place of the seizure;
- (d) The connection between the vehicle, trailer or similar conveyance and the violation of Section 63-21-39;
- (e) The instructions for filing a request for judicial review; and

(f) A statement that the vehicle, trailer or similar conveyance will be forfeited to the seizing law enforcement agency if a request for judicial review is not timely filed.

(5) Any person claiming an interest in a vehicle, trailer or similar conveyance which is the subject of a notice under this section may, within thirty (30) days after receipt of the notice or of the date of the first publication of the notice, file a petition to contest forfeiture signed by the claimant in the county court, if a county court exists, or otherwise in the circuit court of the county in which the seizure is made or the county in which the criminal prosecution is brought, in order to claim an interest in the vehicle, trailer or similar conveyance. Upon the filing of the petition and the payment of the filing fees, service of the petition shall be made on the attorney for or representative of the seizing law enforcement agency, and the proceedings shall thereafter be governed by the rules of civil procedure.

(6) If no petition to contest forfeiture is timely filed, the attorney for the seizing law enforcement agency shall prepare a written declaration of forfeiture of the subject vehicle, trailer or similar conveyance and the forfeited vehicle, trailer or similar conveyance shall be used, distributed or disposed of in accordance with the provisions of Section 63-21-107.

SOURCES: Laws, 2013, ch. 570, § 3, eff from and after July 1, 2013.

Editor's Note — This section is being set out to correct an error in an internal reference in subsection (1). The reference to "Section 63-21-69" was changed to "Section 63-21-39."

TITLE 71

LABOR AND INDUSTRY

CHAPTER 3

Workers' Compensation

GENERAL PROVISIONS

§ 71-3-3. Definitions.

JUDICIAL DECISIONS

- 17. Disability.
- 18. Employee, generally.
- 23. Injury, generally.
- 30. —Proof of injuries.

17. Disability.

Workers' Compensation Commission erred in denying a former employee benefits for a permanent and total disability. The testimony from the employee's vocational specialist indicated that the employee had a 100% loss in the labor market, and the testimony of the opposing vocational expert showed that the employee should, at the very least, have been assessed a loss of wage-earning capacity. *Logan v. Klaussner Furniture Corp.*, — So. 2d —, 2013 Miss. App. LEXIS 319 (Miss. Ct. App. June 4, 2013).

18. Employee, generally.

Mississippi Workers' Compensation Commission erred by declaring that a

claimant's permanent total disability benefits related back to the date of injury, as he was not "disabled" on that date because he was able to continue to work thereafter. *Eaton Corp. v. Brown*, — So. 2d —, 2013 Miss. App. LEXIS 344 (Miss. Ct. App. June 11, 2013).

23. Injury, generally.

30. —Proof of injuries.

Workers' Compensation Commission properly affirmed the denial of benefits to an employee because the employee did not seek medical treatment for a month after developing knee pain, told a nurse at the hospital that he had injured his knee while running and denied any work-related injury, and the medical testimony was insufficient to establish a work-related injury. *Johnson v. Sysco Food Servs.*, — So. 2d —, 2013 Miss. App. LEXIS 628 (Miss. Ct. App. Sept. 24, 2013).

§ 71-3-7. Liability for payment of compensation.

JUDICIAL DECISIONS

38. Injury from assault or other intentional acts.

Substantial evidence supported a decision that the claimant acted in such a way as to intentionally injure himself, thus disqualifying himself from benefits, as it showed that the claimant had one hand on the primary electrical line and one on the

neutral line at the time of the incident, and given the large distance between the lines, a finding that he intentionally placed his hands on the lines being fully aware of the consequences was warranted. *Smith v. Tippah Elec. Power Ass'n*, — So. 2d —, 2013 Miss. App. LEXIS 298 (Miss. Ct. App. May 28, 2013).

§ 71-3-13. Maximum and minimum recovery.

JUDICIAL DECISIONS

2. Partial disability cases.

Employee's permanent-partial disability compensation period for two injuries that arose from a workplace accident was properly limited to 450 weeks in order to avoid the pyramiding of benefits, as the 450-week award for his body-as-a-whole

injury would have still been running when the 200-week award for his shoulder injury would have started to run. *Tucker v. Bellsouth Telcoms., Inc.*, — So. 2d —, 2013 Miss. App. LEXIS 357 (Miss. Ct. App. June 18, 2013).

§ 71-3-17. Compensation for disability.

JUDICIAL DECISIONS

4. Wage earning capacity, generally.**9. — Particular cases; no loss in earning capacity.****4. Wage earning capacity, generally.****9. — Particular cases; no loss in earning capacity.**

Decision that an injured employee was not due additional temporary disability benefits was supported by substantial evidence because she was offered a job by the city within her lifting restrictions, her salary was equal to her prior salary, the employee ultimately failed to return to

work, and her attempts to find employment were unsuccessful. *Herbert v. City of Horn Lake*, — So. 2d —, 2013 Miss. App. LEXIS 643 (Miss. Ct. App. Oct. 1, 2013).

Mississippi Workers' Compensation Commission erred by declaring that a claimant's permanent total disability benefits related back to the date of injury, as he was not "disabled" on that date because he was able to continue to work thereafter. *Eaton Corp. v. Brown*, — So. 2d —, 2013 Miss. App. LEXIS 344 (Miss. Ct. App. June 11, 2013).

§ 71-3-35. Limitation.

JUDICIAL DECISIONS

2. When period commences.**4. Statutory bar, generally.****10. Estoppel.****2. When period commences.**

Workers' compensation claim was time-barred because there was substantial evidence to support the Mississippi Workers' Compensation Commission's finding that the statute of limitations began to run when an orthopedic surgeon, on referral from the claimants' primary-care physician, diagnosed the claimant with carpal tunnel syndrome as the claimant's injury then became reasonably apparent and was more clearly found to be work related. *Brown v. Ill. Tool Works, Inc.*, — So. 2d —, 2013 Miss. App. LEXIS 486 (Miss. Ct. App. Aug. 13, 2013).

4. Statutory bar, generally.

Substantial evidence supported the Commission's finding that an employee's claim was barred by the two-year statute of limitations contained in the Worker's Compensation Act, Miss. Code Ann. § 71-3-35(1) and that the employee's salary failed to constitute wages in lieu of compensation; because nothing in the record showed that the employee's physicians restricted him from working, and the employer insisted that it did not pay the employee his wages in recognition of a compensable disability, but rather in return for work he performed. *Ladner v. Zachry Constr. & Zurich Am. INS. Co.*, — So. 2d —, 2013 Miss. App. LEXIS 257 (Miss. Ct. App. May 14, 2013).

Firefighter's claim for workers' compensation benefits was not barred by the two-year statute of limitations period because he was not reasonably aware of the compensable nature of his latent asbestos-related respiratory disease at any time prior to the year he in which he filed his claim. *City of Jackson v. Sandifer*, — So. 2d —, 2013 Miss. App. LEXIS 703 (Miss. Ct. App. Oct. 22, 2013).

cause of their failure immediately to pursue a hearing on the defense and their substantial participation in discovery and litigation for three years, nor did the doctrine of equitable estoppel apply to the case because the claimant was never misled by the employer about workers' compensation benefits *Brown v. Ill. Tool Works, Inc.*, — So. 2d —, 2013 Miss. App. LEXIS 486 (Miss. Ct. App. Aug. 13, 2013).

10. Estoppel.

Employer and an insurance carrier did not waive the statute of limitations be-

§ 71-3-53. Continuing jurisdiction of the commission.

JUDICIAL DECISIONS

2. Redetermination after review.

Mississippi Worker's Compensation Commission did not err in failing to reopen a claim because there was no merit to the claimant's assertion that there was a mistake in a determination of fact re-

garding the Commission not having the claimant's address or the claimant failing to pursue the claim for workers' compensation benefits. *Rea v. Foamex*, — So. 2d —, 2013 Miss. App. LEXIS 523 (Miss. Ct. App. Aug. 27, 2013).

CHAPTER 5

Unemployment Compensation

ARTICLE 11.

BENEFITS.

§ 71-5-513. Disqualifications [Repealed effective July 1, 2019].

JUDICIAL DECISIONS

7. Misconduct discharge, generally.

Employee was improperly denied unemployment benefits because her conduct did not amount to insubordination, her actions did not violate the employee handbook, her single incident of disrespectful behavior was not misconduct where there

was no constant and continual direct order to do anything, and she was never warned that she would be fired. *Gammage v. Miss. Dep't of Empl. Sec.*, — So. 2d —, 2013 Miss. App. LEXIS 293 (Miss. Ct. App. May 28, 2013).

TITLE 75

REGULATION OF TRADE, COMMERCE AND INVESTMENTS

CHAPTER 2

Uniform Commercial Code — Sales

PART 2.

FORM, FORMATION AND READJUSTMENT OF CONTRACT.

§ 75-2-201. Formal requirements; statute of frauds.

JUDICIAL DECISIONS

C. Writing.

15. In general; necessity.

C. Writing.

15. In general; necessity.

Chapter 13 debtor's claim that he had an oral agreement with a creditor to sell the creditor a company he owned that manufactured and sold bird calls, in ex-

change for payment of \$250,000 in five \$50,000 increments over five years and the creditor's promise to forgive debts the debtor owed under several promissory notes he signed, was barred by two Mississippi statutes of frauds: Miss. Code Ann. §§ 15-3-1 and 75-2-201. *Ziegler v. Hood* (in re Hood), — Bankr. —, 2013 Bankr. LEXIS 3709 (Bankr. N.D. Miss. Sept. 3, 2013).

CHAPTER 3

Uniform Commercial Code — Negotiable Instruments

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

§ 75-3-102. Subject matter.

JUDICIAL DECISIONS

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Applicability.

I. DECISIONS UNDER UNIFORM COMMERCIAL CODE.

1. Applicability.

Because four CDs were non-negotiable, they were not instruments governed by

Article 3 of Mississippi's Uniform Commercial Code, Miss. Code Ann. § 75-3-101 et seq. *Ravenstein v. Cmty. Trust Bank*, — So. 2d —, 2013 Miss. App. LEXIS 476 (Miss. Ct. App. Aug. 6, 2013).

CHAPTER 4

Uniform Commercial Code—Bank Deposits and Collections

PART 1.

GENERAL PROVISIONS AND DEFINITIONS.

§ 75-4-103. Variation by agreement; measure of damages; action constituting ordinary care.

JUDICIAL DECISIONS

2. Permissible variations.

Customer's suit against a bank arising out of checks forged by the customer's bookkeeper failed because it did not report the forgeries within 60 days, as required by its deposit agreement, and Miss. Code

Ann. § 75-4-406(f)'s one-year notice provision for unauthorized signatures could be varied by the deposit agreement. *Century Constr. Co., Llc v. Bancorpsouth Bank*, — So. 2d —, 2013 Miss. App. LEXIS 343 (Miss. Ct. App. June 11, 2013).

PART 4.

RELATIONSHIP BETWEEN PAYOR BANK AND ITS CUSTOMER.

§ 75-4-406. Customer's duty to discover and report unauthorized signature or alteration.

JUDICIAL DECISIONS

A. Decisions Under Uniform Commercial Code.

4. Notice.

5. —Notice; timeliness.

A. Decisions Under Uniform Commercial Code.

4. Notice.

Customer's report to a bank of unauthorized signatures or alterations of checks should be sufficient to at least identify the quantity of checks involved, their amounts, the dates and check numbers, the names of the payees, or any other specific information upon which the bank could have acted. *Century Constr. Co., Llc v. Bancorpsouth Bank*, — So. 2d —, 2013 Miss. App. LEXIS 343 (Miss. Ct. App. June 11, 2013).

Though a customer notified the bank about forgeries on its account, it did not give the required statutory notice until it sent the bank a ledger listing the checks the bank paid that had been forged. *Century Constr. Co., Llc v. Bancorpsouth Bank*, — So. 2d —, 2013 Miss. App. LEXIS 343 (Miss. Ct. App. June 11, 2013).

5. —Notice; timeliness.

Customer's suit against a bank arising out of checks forged by the customer's bookkeeper failed because it did not report the forgeries within 60 days, as required by its deposit agreement, and under Miss. Code Ann. § 75-4-103(a), the statutory one-year notice provision for unauthorized signatures could be varied by the deposit agreement. *Century Constr. Co., Llc v. Bancorpsouth Bank*, — So. 2d —, 2013 Miss. App. LEXIS 343 (Miss. Ct. App. June 11, 2013).

TITLE 81

BANKS AND FINANCIAL INSTITUTIONS

Chapter 18.	Mississippi S.A.F.E. Mortgage Act	81-18-1
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CHAPTER 18

Mississippi S.A.F.E. Mortgage Act

In General	81-18-1
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IN GENERAL

Sec.	
81-18-21.	Maintenance and investigation of business records; biennial investigation; examination fee; department authorized to examine persons suspected of conducting business requiring a license; licensee to make records and books available to commissioner and compile reports; commissioner may control access to records of licensee under investigation [Repealed effective July 1, 2016].

§ 81-18-21. Maintenance and investigation of business records; biennial investigation; examination fee; department authorized to examine persons suspected of conducting business requiring a license; licensee to make records and books available to commissioner and compile reports; commissioner may control access to records of licensee under investigation [Repealed effective July 1, 2016].

(1) Any person required to be licensed under this chapter shall maintain in its offices, or such other location as the department shall permit, the books, accounts and records necessary for the department to determine whether or not the person is complying with the provisions of this chapter and the rules and regulations adopted by the department under this chapter. These books, accounts and records shall be maintained apart and separate from any other business in which the person is involved and may represent historical data for three (3) years preceding the date of the last license application date forward. The books, accounts and records shall be kept in a secure location under conditions that will not lead to their damage or destruction. If the licensee wishes to keep the files in a location other than the location listed on the license, then the licensee first must submit a written request on a form designated by the department and gain written approval from the commissioner before storing the files at an off-site secure location.

(2) To assure compliance with the provisions of this chapter, the department may examine the books and records of any licensee without notice during normal business hours. The commissioner shall charge the licensee an examination fee in an amount not less than Three Hundred Dollars (\$300.00) nor

more than Six Hundred Dollars (\$600.00) per day with a maximum examination fee of Two Thousand Four Hundred Dollars (\$2,400.00) for each office or location within the State of Mississippi, and an examination fee in an amount not less than Three Hundred Dollars (\$300.00) nor more than Eight Hundred Dollars (\$800.00) per day for each office or location outside the State of Mississippi, plus any actual expenses incurred while examining the licensee's records or books that are located outside the State of Mississippi. However, in no event shall a licensee be examined more than once in a two-year period unless for cause shown based upon consumer complaint and/or other exigent reasons as determined by the commissioner.

(3) The department, its designated officers and employees, or its duly authorized representatives, for the purposes of discovering violations of this chapter and for the purpose of determining whether any person or individual reasonably suspected by the commissioner of conducting business that requires a license under this chapter, may investigate those persons and individuals and examine all relevant books, records and papers employed by those persons or individuals in the transaction of business, and may summon witnesses and examine them under oath concerning matters as to the business of those persons, or other such matters as may be relevant to the discovery of violations of this chapter, including, without limitation, the conduct of business without a license as required under this chapter.

(4) Each licensee, individual or person subject to this chapter shall make available to the commissioner upon request the books and records relating to the operations of the licensee, individual or person subject to this chapter. The commissioner shall have access to those books and records and interview the officers, principals, mortgage loan originators, employees, independent contractors, agents, and customers of the licensee, individual or person subject to this chapter concerning their business.

(5) Each licensee, individual or person subject to this chapter shall make or compile reports or prepare other information as directed by the commissioner in order to carry out the purposes of this section, including, but not limited to:

(a) Accounting compilations;

(b) Information lists and data concerning loan transactions in a format prescribed by the commissioner; or

(c) Such other information deemed necessary to carry out the purposes of this section.

(6) In making any examination or investigation authorized by this chapter, the commissioner may control access to any documents and records of the licensee or person under examination or investigation. The commissioner may take possession of the documents and records or place a person in exclusive charge of the documents and records in the place where they are usually kept. During the period of control, no individual or person shall remove or attempt to remove any of the documents and records except under a court order or with the consent of the commissioner. Unless the commissioner has reasonable grounds to believe the documents or records of the licensee have been or are at

risk of being altered or destroyed for purposes of concealing a violation of this chapter, the licensee or owner of the documents and records shall have access to the documents or records as necessary to conduct its ordinary business affairs.

(7) The commissioner shall report regularly violations of this chapter, as well as enforcement actions and other relevant information, to the Nationwide Mortgage Licensing System and Registry subject to the provisions contained in Section 81-18-63.

(8) Examinations and investigations conducted under this chapter and information obtained by the department, except as provided in subsection (7) of this section, in the course of its duties under this chapter are confidential.

(9) In the absence of malice, fraud or bad faith a person is not subject to civil liability arising from the filing of a complaint with the department, furnishing other information required by this chapter, information required by the department under the authority granted in this chapter, or information voluntarily given to the department related to allegations that a licensee or prospective licensee has violated this chapter.

(10) In order to carry out the purposes of this section, the commissioner may:

(a) Accept and rely on examination or investigation reports made by other government officials, within or without this state; or

(b) Accept audit reports made by an independent certified public accountant for the licensee, individual or person subject to this chapter in the course of that part of the examination covering the same general subject matter as the audit and may incorporate the audit report in the report of the examination, report of investigation or other writing of the commissioner.

(11) The authority of this section shall remain in effect, whether such a licensee, individual or person subject to this chapter acts or claims to act under any licensing or registration law of this state, or claims to act without that authority.

(12) No licensee, individual or person subject to investigation or examination under this section may knowingly withhold, abstract, remove, mutilate, destroy or secrete any books, records, computer records or other information.

SOURCES: Laws, 2000, ch. 579, § 11; reenacted and amended, Laws, 2002, ch. 500, § 12; reenacted and amended, Laws, 2004, ch. 364, § 12; reenacted and amended, Laws, 2007, ch. 581, § 12; Laws, 2009, ch. 544, § 12; reenacted without change, Laws, 2010, ch. 462, § 13; reenacted without change, Laws, 2012, ch. 571, § 12; Laws, 2013, ch. 499, § 6, eff from and after July 1, 2013.

Editor's Note — This section was set out to correct an error in the 2013 Cumulative Supplement.

TITLE 83

INSURANCE

CHAPTER 11

Automobile Insurance

ARTICLE 3.

UNINSURED MOTORIST COVERAGE.

§ 83-11-101. Automobile liability policies to contain “uninsured motorist” and property damage provisions.

JUDICIAL DECISIONS

15. Waiver of uninsured motorist coverage.

Fact issues as to whether an insurance agent explained the costs and benefits of uninsured motorist (UM) coverage and whether the insureds gave a knowing and intelligent waiver of UM coverage precluded summary judgment on a UM claim where the insureds testified they did not read the provision before signing a waiver and that the agent did not explain the waiver to them. *Honeycutt v. Coleman*, — So. 2d —, 2013 Miss. LEXIS 315 (Miss. May 30, 2013).

Any waiver of uninsured motorist (UM) coverage must be made knowingly, intel-

ligently, and in writing, with the insurer bearing the burden of proof, which may be met by establishing that the insurer provided an explanation, appropriate to the client, of UM coverage or that the client was fully knowledgeable through other sources of the purposes and benefits of UM coverage; any document signed by the client that states that an explanation was given to the client may be considered, but is not dispositive. Whether a client made a knowing and intelligent waiver of UM coverage is a question of fact for the factfinder. *Honeycutt v. Coleman*, — So. 2d —, 2013 Miss. LEXIS 315 (Miss. May 30, 2013).

CHAPTER 58

New Home Warranty Act

§ 83-58-17. Statutory remedy for damages arising from violations of home warranty law; common law remedies.

JUDICIAL DECISIONS

1.-2. [Reserved for future use.]

3. Builder.

1.-2. [Reserved for future use.]

3. Builder.

It was undisputed that plaintiffs entered into a contract with the building

corporation, not debtor, its sole owner. As a result, plaintiff was not entitled to relief from debtor under the New Home Warranty Act. *Hoffmeister v. Early* (in re Early), — Bankr. —, 2013 Bankr. LEXIS 4128 (Bankr. S.D. Miss. Sept. 30, 2013).

TITLE 85
DEBTOR-CREDITOR RELATIONSHIP

CHAPTER 7

Liens

LIEN ON AMOUNT DUE CONTRACTOR

§ 85-7-185. Bond; provisions; right to intervene in action on bond.

JUDICIAL DECISIONS

8. Bid awards.

That appellant's suppliers were protected by a payment bond did not preclude a school board, which awarded the contract to the next lowest bidder, from con-

sidering appellant's prior payment disputes with suppliers. *Rod Cooke Constr. Co. v. Lamar County Sch. Bd.*, — So. 2d —, 2013 Miss. App. LEXIS 641 (Miss. Ct. App. Oct. 1, 2013).

TITLE 89
REAL AND PERSONAL PROPERTY

CHAPTER 1
Land and Conveyances

IN GENERAL

§ 89-1-7. Estate in two or more persons.

JUDICIAL DECISIONS

4. Tenancy by entirety.

Chapter 13 debtor who owned real property with her husband as a tenant by the entirety, which she claimed as her homestead, was allowed under 11 U.S.C.S. § 522(b)(3)(B) to exempt the full value of the property from unsecured creditors' claims for debts she incurred separately, when her husband did not join

her in filing bankruptcy. Mississippi was a common law state, the common law of Mississippi constituted "applicable nonbankruptcy law" under § 522(b)(3)(B), and her homestead was exempt under Mississippi law from any process which could arise from the claims at issue. In re Dixon, — Bankr. —, 2011 Bankr. LEXIS 5680 (Bankr. S.D. Miss. Mar. 31, 2011).

TITLE 91

TRUSTS AND ESTATES

CHAPTER 5

Wills and Testaments

§ 91-5-1. Who may execute; signature; attestation.

JUDICIAL DECISIONS

- 8. Testamentary capacity.
- 11. —Undue influence.
- 12. Execution, in general.

8. Testamentary capacity.

11. —Undue influence.

In a will contest amongst siblings, the proponent and beneficiary was unable to overcome the presumption of undue influence because, inter alia, the beneficiary was substantially involved in the procurement of the will and paid the costs of the will's execution, and the testator, who was the siblings' mother, was not aware of her total assets and their worth, was totally dependent on the beneficiary to handle

her finances, and did not seek advice from a person disconnected to the beneficiary. *Thomas v. Thomas*, — So. 2d —, 2013 Miss. App. LEXIS 512 (Miss. Ct. App. Aug. 20, 2013).

12. Execution, in general.

Although a testator did not affix her initials in the margins of the first two pages of her four-page will, the will was validly executed because there was evidence the testator actually signed the will in the presence of two attesting witnesses. *Thomas v. Thomas*, — So. 2d —, 2013 Miss. App. LEXIS 512 (Miss. Ct. App. Aug. 20, 2013).

CHAPTER 9

Trusts and Trustees

ARTICLE 3.

UNIFORM TRUSTEES' POWERS.

§ 91-9-107. Powers of trustee conferred by this article.

JUDICIAL DECISIONS

1. In general.

Debtor breached his fiduciary duty to lenders under Mississippi law by commingling trust funds with personal funds and using those commingled trust funds for a purpose other than for what they were

intended, resulting in losses to creditor, a title insurance company. *Fid. Nat'l Title INS. Co. v. Colson (in re Colson)*, — Bankr. —, 2013 Bankr. LEXIS 4001 (Bankr. S.D. Miss. Sept. 23, 2013).

TITLE 93

DOMESTIC RELATIONS

Chapter 13. Guardians and Conservators	93-13-1
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CHAPTER 5

Divorce and Alimony

§ 93-5-23. Custody of children; alimony; effect of military duty on custody and visitation.

JUDICIAL DECISIONS

III. SUPPORT OF CHILDREN.

- 23. Amount of support.
- 27. Termination or nonsupport.

VII. OTHER MATTERS.

- 62. Property division.

III. SUPPORT OF CHILDREN.

23. Amount of support.

In calculating child support, the trial court abused its discretion in attributing any future rental income to the husband, as it had awarded the rental property to the wife. *Collins v. Collins*, — So. 2d —, 2013 Miss. LEXIS 285 (Miss. May 9, 2013).

In calculating child support, the trial court erred in arbitrarily determining a husband's monthly income to exclusion of the undisputed evidence he provided, due to his failure to comply with Miss. Unif. Ch. Ct. R. 8.05, because the remedy for his violation was to hold him in contempt, not to disregard the credible evidence he provided. *Collins v. Collins*, — So. 2d —, 2013 Miss. LEXIS 285 (Miss. May 9, 2013).

27. Termination or nonsupport.

Chancery court did not abuse its discretion by declining to require a parent to

provide post-majority financial support for the parent's child because Mississippi law did not vest the court with the authority to mandate that parents financially support their offspring post-majority. The duty imposed for a parent to support its child does not extend beyond the child's minority, which terminates when the child reaches twenty-one years of age. *Hays v. Alexander*, — So. 2d —, 2013 Miss. LEXIS 324 (Miss. June 6, 2013).

VII. OTHER MATTERS.

62. Property division.

Chancellor acted within her discretion in choosing the date of the divorce, rather than the date of a temporary support order, to mark the point of demarcation between marital and separate property. To the extent that *Pittman v. Pittman*, 791 So. 2d 857 (Miss. Ct. App. 2001), could be read to create a rule that a temporary support order always and necessarily indicated the point of demarcation, the Mississippi Supreme Court overruled it. *Collins v. Collins*, — So. 2d —, 2013 Miss. LEXIS 285 (Miss. May 9, 2013).

CHAPTER 13

Guardians and Conservators

Wards, Generally	93-13-1
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WARDS, GENERALLY

SEC.

93-13-67. Annual accounts; guardian's minimum commission; closure of guardianship file without final accounting under certain circumstances.

§ 93-13-67. Annual accounts; guardian's minimum commission; closure of guardianship file without final accounting under certain circumstances.

(1) Except as herein provided, and as provided in Section 93-13-7, or 93-13-37 and 93-13-38, every guardian shall, at least once in each year, and oftener if required, exhibit his account, showing the receipts of money on account of his ward, and showing the annual product of the estate under his management, and the sale or other disposition thereof, and showing also each item of his expenditure in the maintenance and education of his ward and in the preservation and management of his estate, supported by legal vouchers. In the event that the account shall be presented by a bank or trust company which is subject to the supervision of the Department of Finance and Administration of the State of Mississippi or of the comptroller of the currency of the United States and such account, or the petition for the approval of same, shall contain a statement under oath by an officer of said bank or trust company showing that the vouchers covering the disbursements in the account presented are on file with the bank or trust company, the bank or trust company shall not be required to file vouchers. The bank or trust company shall produce the vouchers for inspection of any interested party or his or her attorney at any time during legal banking hours at the office of the bank or trust company; the court on its own motion or on the motion of any interested party may require that the vouchers be produced and inspected at any hearing of any objections to the annual account. The accounts shall be examined, approved, and allowed by the court in the same way that the accounts of executors and administrators are examined, approved, and allowed. Compliance with the duties required, in this section, of guardian shall be enforced by the same means and in the same manner as is provided in respect to the accounts of executors and administrators.

(a) However, when the funds and personal property of the ward do not exceed the sum or value of Three Thousand Dollars (\$3,000.00) and there is no prospect of further receipt to come into the hands of the guardian other than interest thereon, or in guardianships in which the only funds on hand or to be received by the guardian are funds paid or to be paid by the Department of Human Services for the benefit of the ward, the chancery court or chancellor in vacation, may, for good cause shown, in his discretion and upon being satisfied it is to the best interest and welfare of the ward, authorize the guardian to dispense with further such annual accounts, except such as may be a final account. Furthermore, the chancery court or chancellor in vacation may dispense with annual accounts if the ward's assets consist solely of funds on deposit at any banking corporation, building

and loan association or savings and loan association in this state; have been so deposited under order of the court to remain until otherwise ordered; are fully insured; and a certified copy of the order to deposit, properly receipted, furnished the depository. If the court, or chancellor in vacation, authorizes the discontinuance of annual accounts, the guardian may, without further order of the court, from time to time pay the court costs and bond premiums owing by the estate or him as guardian, and, as well, he may likewise pay emergency obligations as he may have been empowered and allowed to do by necessity except for this section; but, he shall not pay from guardianship funds any other sums without further order of such court or chancellor without having first obtained order of the court or chancellor to do so. If emergency expenditure is needed for the immediate and necessary welfare of the ward, it shall at once be reported to the court, or chancellor in vacation, for approval. Furthermore, the court on its own motion or on the motion of any interested party may require the resumption and continuance of annual accounts.

(b) At the time of any annual account, the court, or a judge thereof in vacation, in its discretion, may allow to the guardian a minimum commission of One Hundred Dollars (\$100.00) per annum for its services, anything in the statutes of this state to the contrary notwithstanding.

(2) If the ward was a minor and the guardianship terminates by any means upon the ward obtaining majority, if a final accounting is not made and the ward does not petition the court to compel a final accounting on or before July 1, 2014, or the twenty-second birthday of the ward, whichever comes last, the court may close its file on the guardianship unless it appears to the court that the court should seek accounting on its own motion.

SOURCES: Codes, Hutchinson's 1848, ch. 36, art. 1(128); 1857, ch. 60, art. 147; 1871, §§ 1214, 1215; 1880, § 2103; 1892, § 2222; 1906, § 2441; Hemingway's 1917, § 2002; 1930, § 1889; 1942, § 425; Laws, 1960, ch. 217, § 1; Laws, 1962, ch. 273; Laws, 1966, ch. 320, § 1; Laws, 1972, ch. 408, § 13; Laws, 1974, ch. 365; Laws, 2013, ch. 339, § 4; Laws, 2013, ch. 554, § 2, eff from and after July 2, 2013.

Editor's Note — This section was amended in 2013 to, among other things, substitute "Department of Finance and Administration" for "department of bank supervision of the State of Mississippi" in the second sentence of subsection (1). The reference should probably have been changed to "Mississippi Department of Banking and Consumer Finance." The section is set out above as amended by Section 2 of Chapter 554, Laws of 2013.

CHAPTER 15

Termination of Rights of Unfit Parents

§ 93-15-103. Factors justifying adoption; grounds for termination of parental rights; alternatives.

JUDICIAL DECISIONS

3. Abandonment or neglect.
4. Erosion of parent/child relationship.

3. Abandonment or neglect.

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as the parent had not visited or communicated with the child in almost five years and had not financially supported her for more than four years. *Barnes v. McGee*, — So. 2d —, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. Oct. 22, 2013).

4. Erosion of parent/child relationship.

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as there had been a substantial erosion of the relationship between the parent and the child, which was caused at least in part by the parent's serious neglect, prolonged and unreasonable absence, and unreasonable failure to visit or communicate. *Barnes v. McGee*, — So. 2d —, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. Oct. 22, 2013).

§ 93-15-109. Termination of parental rights.

JUDICIAL DECISIONS

2. Clear and convincing proof.

Termination of a parent's parental rights and support obligations to the parent's child was appropriate because the chancellor found by clear and convincing evidence that termination was in the best interest of the child as the parent had not

visited or communicated with the child in almost five years and had not financially supported the child for more than four years. *Barnes v. McGee*, — So. 2d —, 2013 Miss. App. LEXIS 706 (Miss. Ct. App. Oct. 22, 2013).

CHAPTER 16

Grandparents' Visitation Rights

§ 93-16-3. Who may petition for visitation rights; when; court in which to file petition.

JUDICIAL DECISIONS

1. In general.
2. Attorney fees.

1. In general.

Right to grandparent visitation is purely statutory and may only be considered if the grandparent meets certain statutory criteria, and the criteria in Mississippi's grandparent-visitation statute are important; by placing limitations on who may petition for visitation, the criteria keep a grandparent's statutory right to visitation from impermissibly encroaching on the parents' rights to rear their children as they see fit. *Aydelott v. Quartaro*, — So. 2d —, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. June 4, 2013).

Broadening the limiting criterion of a "viable relationship" to grandparents who wish they had a viable relationship would render the grandparent-visitation statute unconstitutional because it would permit any grandparent to petition for visitation and not just those who meet the narrow circumstances under the statute. *Aydelott v. Quartaro*, — So. 2d —, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. June 4, 2013).

Because the chancellor did not give the grandparent-visitation statute the necessary narrower reading, his explicit finding of a viable relationship and implicit finding of unreasonable denial of visitation failed to pass constitutional muster; the

chancellor erred in weighing the grandparents' wishes into whether there was a viable relationship and never explicitly found the parents had unreasonably denied the grandparents visitation. *Aydelott v. Quartaro*, — So. 2d —, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. June 4, 2013).

Chancellor erred in awarding grandparents visitation because they failed to show they met the criterion of the establishment of a viable relationship with their granddaughters; the chancellor erred in ignoring the grandparents' admissions and permitting contradictory testimony that they had contributed financially and had frequently visited the grandchildren because they never moved for withdrawal or amendment of their admissions. *Aydelott v. Quartaro*, — So. 2d —, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. June 4, 2013).

2. Attorney fees.

Chancellor did not abuse his discretion in denying parents' request for attorney's fees because the chancellor found no financial hardship would result from their having to pay their own attorney's fees based on the parents' combined income and expenses left sufficient disposable income for travel and entertainment and extra vehicles. *Aydelott v. Quartaro*, — So. 2d —, 2013 Miss. App. LEXIS 327 (Miss. Ct. App. June 4, 2013).

CHAPTER 17

Adoption, Change of Name, and Legitimation of Children

IN GENERAL

§ 93-17-7. Parental objection; causes for termination of unfit parents' rights.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

5. Grounds for termination — Abandonment or desertion.

I. UNDER CURRENT LAW.

5. Grounds for termination — Abandonment or desertion.

Court properly terminated a seven-year-old child's parents' parental rights

and allowed the child's adoption, as there was substantial evidence that the parents suffered from chemical dependency, the mother admitted that the mother never bought any food or clothes for the child, and the parents had never provided consistent individual care of the child. *Little v. Norman*, — So. 2d —, 2013 Miss. App. LEXIS 457 (Miss. Ct. App. July 23, 2013).

TITLE 97

CRIMES

CHAPTER 1

Conspiracy, Accessories and Attempts

§ 97-1-1. Conspiracy.

JUDICIAL DECISIONS

9. Evidence.

14.5. — Sufficiency; conspiracy.

9. Evidence.

14.5. — Sufficiency; conspiracy.

Sufficient evidence supported defendant's conviction for conspiracy to commit murder, even though there was no express agreement between defendant and two co-defendants, because the evidence showed that defendant and co-defendants, while engaged in different acts, all pursued the common object of the victim's death, and the State was not required to prove the existence of an express agree-

ment to murder the victim. *Graham v. State*, — So. 2d —, 2013 Miss. LEXIS 339 (Miss. June 13, 2013).

Evidence supported defendant's conviction of conspiracy, as defendant admitted at trial that defendant intended to cook methamphetamine, in a bedroom where defendant's associates were sleeping police officers found 156 dosage units of pseudoephedrine, and in one associate's truck officers found a receipt for the purchase of pseudoephedrine. *Edmonds v. State*, — So. 2d —, 2013 Miss. App. LEXIS 529 (Miss. Ct. App. Aug. 27, 2013).

§ 97-1-5. Accessories after the fact; punishment.

JUDICIAL DECISIONS

4. Instructions.

Defendant juvenile was not entitled to an accessory-after-the-fact instruction since defendant's involvement in the underlying robbery began earlier in the day

when the group decided to go "hit a lick" and headed to the gas station where the victim was killed. *Hye v. State*, — So. 2d —, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. May 28, 2013).

CHAPTER 3

Crimes Against the Person

§ 97-3-7. Simple assault; aggravated assault; simple domestic violence; aggravated domestic violence.

JUDICIAL DECISIONS

10. Evidence; generally.

15. — Sufficiency.

16. — — Charge or conviction support-

able.

19. Instructions; generally.

23. — Lesser offense.

28. Miscellaneous.

10. Evidence; generally.

15. — Sufficiency.

Evidence was sufficient to convict defendant of aggravated assault in the attempted shooting of the victim, and the verdict was not against the overwhelming weight of the evidence, because defendant had lost a fight with the victim and was bloodied and humiliated; immediately before the shooting, defendant threatened the victim; and the jury could have concluded that defendant simply missed when he tried to shoot the victim. *Winn v. State*, — So. 2d —, 2013 Miss. App. LEXIS 557 (Miss. Ct. App. Sept. 3, 2013).

Evidence was sufficient to find defendant guilty of aggravated domestic violence by either strangulation or attempted strangulation because the record contained evidence that defendant intentionally blocked the nose or mouth of the victim by any means. *Clark v. State*, — So. 2d —, 2013 Miss. App. LEXIS 533 (Miss. Ct. App. Aug. 27, 2013).

Sufficient evidence supported defendant's conviction for aggravated assault because even if the victim's alleged gun had been found, the jury still could have concluded defendant was the aggressor, the shooting resulted from mutual combat, or even that the victim was reaching for his own gun in self-defense. *Wansley v. State*, — So. 2d —, 2013 Miss. App. LEXIS 316 (Miss. Ct. App. June 4, 2013).

16. — — Charge or conviction supportable.

Evidence was sufficient to convict defendant of simple assault and the verdict was not against the weight of the evidence because defendant presented no evidence that he feared imminent death or great bodily harm to himself or to his daughter justifying the use of force; defendant pinned the victim in the door of his vehicle; and the victim testified that she called out in pain several times and had bruises as a result of the incident. *Matthews v. City of Madison*, — So. 2d —, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. Sept. 17, 2013).

Evidence was sufficient to find defendant guilty of aggravated assault because

the victim identified defendant as the shooter in a photo lineup prior to trial and another eyewitness identified defendant at trial as the person who shot the victim. *Haywood v. State*, — So. 2d —, 2013 Miss. App. LEXIS 290 (Miss. Ct. App. May 28, 2013).

19. Instructions; generally.

23. — Lesser offense.

In a felonious child abuse case, because the child's burns were not caused by a child exploring her environment, the doctor who treated her unequivocally opined that the burns were nonaccidental, the burns came from a hot, solid object, and no reasonable juror could find the child's second-degree burns on nondominant fingers were not considered serious bodily harm, the trial court did not err in refusing to instruct the jury on the lesser-offense of simple assault. *Harris v. State*, — So. 2d —, 2013 Miss. App. LEXIS 607 (Miss. Ct. App. Sept. 17, 2013).

Trial court's refusal to give a jury instruction on simple assault as a lesser included offense of aggravated assault was proper since: (1) defendant did not present sufficient evidence of negligence since if all of the shots that hit the victim were fired as a result of a struggle, then defendant acted in self-defense, which was inconsistent with negligence; (2) defendant's testimony that he squeezed the trigger once but did not know if he shot the victim was too tenuous for a negligence finding; and (3) squeezing the trigger and hitting the victim caused serious bodily harm, which meant that the case was definitely an aggravated assault case. *Gilmore v. State*, — So. 2d —, 2013 Miss. LEXIS 361 (Miss. June 27, 2013).

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law enforcement officer without committing the crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State's request for a resisting-arrest instruction. *Edwards v. State*, — So. 2d —, 2013 Miss. App. LEXIS 700 (Miss. Ct. App. Oct. 22, 2013).

28. Miscellaneous.

Defendant was not entitled to a new trial on an aggravated assault charge as, despite defendant's account to the contrary, the jury was entitled to believe the victim's detailed account to find that defendant purposely and knowingly shot the

victim, that defendant was the aggressor, and that he did not act in self-defense, and certain facts in defendant's testimony were contradicted by two officers' testimonies. *Gilmore v. State*, — So. 2d —, 2013 Miss. LEXIS 361 (Miss. June 27, 2013).

§ 97-3-15. Homicide; justifiable homicide; use of defensive force; duty to retreat.

JUDICIAL DECISIONS

4. Self-defense; generally.

5. —Evidence.

4. Self-defense; generally.

5. —Evidence.

Evidence was sufficient to convict defendant of simple assault and the verdict was not against the weight of the evidence because defendant presented no evidence

that he feared imminent death or great bodily harm to himself or to his daughter justifying the use of force; defendant pinned the victim in the door of his vehicle; and the victim testified that she called out in pain several times and had bruises as a result of the incident. *Matthews v. City of Madison*, — So. 2d —, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. Sept. 17, 2013).

§ 97-3-17. Homicide; excusable homicide.

JUDICIAL DECISIONS

4. Instructions to jury.

Jury instruction granted by the circuit court did not correctly state the applicable law on accident since it lacked all the elements; the jury should have been privy

to all subsections of the statute to determine if any of them subsections applied to defendant's case. *McTiller v. State*, — So. 2d —, 2013 Miss. App. LEXIS 295 (Miss. Ct. App. May 28, 2013).

§ 97-3-19. Homicide; murder defined; first-degree murder; second-degree murder; capital murder; lesser-included offenses.

JUDICIAL DECISIONS

I. IN GENERAL.

4. Sentence.

21. Indictment.

II. EVIDENTIARY MATTERS.

44. Circumstantial evidence.

49. Sufficiency of evidence; generally.

50. — Conviction sustained — murder.

III. INSTRUCTIONS.

71. Instructions properly denied.

I. IN GENERAL.

4. Sentence.

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann § 47-7-3(1)(h) was not eligible for parole, and as *Miller v. Alabama*, 2012 U.S. LEXIS 4873, was decided while his appeal was pending, his life sentence was vacated and the case was remanded so the trial court could consider the Miller factors before determining sentence. *Parker v.*

State, — So. 2d —, 2013 Miss. LEXIS 321 (Miss. June 6, 2013).

21. Indictment.

Defendant juvenile's indictment was not defective because the capital-murder statute was cited in the heading of the indictment but not the body of the indictment since the indictment listed the appropriate section and subsection in the heading and tracked the language of the statute in the body, and Miss. Code Ann. § 99-17-20 did not specify where the charged section and subsection number had to appear in the indictment. *Hye v. State*, — So. 2d —, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. May 28, 2013).

II. EVIDENTIARY MATTERS.

44. Circumstantial evidence.

Trial court did not err in convicting defendant of murdering her husband; the State proved deliberate-design murder, albeit by circumstantial evidence, because the use of a high-powered rifle was sufficient to supply the necessary ingredient of deliberate design. *Childs v. State*, — So. 2d —, 2013 Miss. LEXIS 302 (Miss. May 23, 2013).

49. Sufficiency of evidence; generally.

50. — Conviction sustained — murder.

Defendant's conviction for deliberate design murder was not against the manifest weight of the evidence because defen-

dant was physically present at the scene of the victim's murder, defendant gave the victim a concoction of water and crushed pills shortly before the victim was strangled, and the murder weapon, a blue dog leash, was found in defendant's trailer. *Graham v. State*, — So. 2d —, 2013 Miss. LEXIS 339 (Miss. June 13, 2013).

Where defendant fatally shot his stepfather after he pushed defendant's mother onto a couch, the evidence was sufficient to convict defendant of deliberate-design murder as it established that neither he nor his mother was in danger, he admitted he could have handled the situation differently, and he had previously threatened the victim with a gun after the victim pushed the mother. *Barron v. State*, — So. 2d —, 2013 Miss. App. LEXIS 314 (Miss. Ct. App. June 4, 2013).

III. INSTRUCTIONS.

71. Instructions properly denied.

Trial court properly declined to give a circumstantial evidence instruction in a case in which defendant was convicted of capital murder for killing the victim while in the commission of a robbery because the armed robbery was an essential element of the charge and was proved through direct evidence, eliminating any need for a circumstantial evidence instruction. *Carson v. State*, — So. 2d —, 2013 Miss. App. LEXIS 645 (Miss. Ct. App. Oct. 1, 2013).

§ 97-3-21. Homicide; penalty for first- or second-degree murder or capital murder.

JUDICIAL DECISIONS

0.5. Constitutionality.

As defendant was 15 at the time of the murder and pursuant to Miss. Code Ann. § 47-7-3(1)(h) was not eligible for parole, and as *Miller v. Alabama*, 2012 U.S. LEXIS 4873, was decided while his appeal

was pending, his life sentence was vacated and the case was remanded so the trial court could consider the Miller factors before determining sentence. *Parker v. State*, — So. 2d —, 2013 Miss. LEXIS 321 (Miss. June 6, 2013).

§ 97-3-65. Statutory rape; enhanced penalty for forcible sexual intercourse or statutory rape by administering certain substances.

JUDICIAL DECISIONS

I. IN GENERAL.

1. In general.

I. IN GENERAL.

1. In general.

Sexual intercourse between an under-age child and an adult clearly is a crime of

violence for purposes of the habitual offender statute, as sexual intercourse cannot occur without the exertion of some degree of physical force, even if it entails no pain or bodily harm and leaves no mark. *Taylor v. State*, — So. 2d —, 2013 Miss. LEXIS 395 (Miss. Aug. 1, 2013).

§ 97-3-79. Robbery; use of deadly weapon.

JUDICIAL DECISIONS

7. Indictment.
21. Miscellaneous.

7. Indictment.

Indictment charging defendant juvenile with capital murder was not defective, even though it referenced this section and did not provide the essential elements of the underlying crime of robbery, since it put defendant on notice that he was being charged with capital murder based on a robbery and defendant was aware that the charged underlying felony was robbery and not armed robbery. *Hye v. State*, — So. 2d —, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. May 28, 2013).

21. Miscellaneous.

Defendant was properly convicted of armed robbery because the evidence supported the jury's finding that defendant was the man who robbed a bank despite misinformation regarding the robber's color, the search of defendant's house and seizure of a gun fell within the Fourth Amendment's protective-sweep exception, and the trial court properly refused defendant's insanity-defense instruction. *Hutto v. State*, — So. 2d —, 2013 Miss. App. LEXIS 315 (Miss. Ct. App. June 4, 2013).

§ 97-3-95. Sexual battery.

JUDICIAL DECISIONS

7. Evidence; generally; admissibility.
9. — Sufficiency.
10. —Other; miscellaneous.
11. Practice and procedure; jury instructions.
13. Other, miscellaneous.

7. Evidence; generally; admissibility.

9. — Sufficiency.

There was substantial evidence to support defendant conviction of sexual battery as alleged in the indictment because the State's burden was met; the child

demonstrated each act through hand gestures while on the witness stand, and a forensic interviewer and a detective offered corroborating testimony that the child described the incidents during interviews. *Jones v. State*, — So. 2d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

10. —Other; miscellaneous.

In a case of sexual battery of a victim under the age of 14, the trial court was not required conduct a preliminary interrogation of the four-year-old child to determine

competency, and defendant did not show that the trial court erred in allowing her to testify. *Graham v. State*, — So. 2d —, 2013 Miss. App. LEXIS 552 (Miss. Ct. App. Sept. 3, 2013).

11. Practice and procedure; jury instructions.

Giving of a jury instruction did not constitute error by allowing the jury to convict defendant on a boarder definition of sexual battery than the crime alleged in the indictment because the jury was fairly and adequately instructed, and defendant was clearly convicted of the crime for which he was charged in the indictment; the disputed language in the instruction did not substantially alter the elements of proof necessary to find defendant guilty. *Jones v. State*, — So. 2d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

Trial court's failure to include in a jury instruction the element of sexual battery that defendant was twenty-four or more months older than the child was not prejudicial and did not amount to plain error because that element was listed in the indictment; therefore, defendant was given sufficient notice and had a reasonable opportunity to prepare and present a defense to that element, but he did not do

so. *Jones v. State*, — So. 2d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

Trial court did not err in failing to include in a jury instruction the element of sexual battery that defendant was twenty-four or more months older than the child because the absence of the element had no effect on the State's burden of proof, and the jury was properly instructed as to the State's burden; any fair-minded juror could have easily deduced that defendant, being twenty-eight years of age, was twenty-four or more months older than the child, who was eight years old. *Jones v. State*, — So. 2d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

13. Other, miscellaneous.

Trial court did not abuse its discretion in denying defendant a mistrial due to remarks the prosecutor made about other children being present in a house when an assault on the child victim occurred because defendant himself provided overwhelming evidence of his guilt in a statement in which he admitted that not only did the victim perform oral sex on defendant, but that defendant had performed anal sex on the victim. *Flowers v. State*, — So. 2d —, 2013 Miss. App. LEXIS 347 (Miss. Ct. App. June 11, 2013).

§ 97-3-97. Sexual battery; definitions.

JUDICIAL DECISIONS

4. Jury Instructions.

Giving of a jury instruction did not constitute error by allowing the jury to convict defendant on a boarder definition of sexual battery than the crime alleged in the indictment because the jury was fairly and adequately instructed, and defendant was clearly convicted of the crime for

which he was charged in the indictment; the disputed language in the instruction did not substantially alter the elements of proof necessary to find defendant guilty. *Jones v. State*, — So. 2d —, 2013 Miss. App. LEXIS 477 (Miss. Ct. App. Aug. 6, 2013).

CHAPTER 5

Offenses Affecting Children

§ 97-5-23. Touching, handling, etc., child, mentally defective or incapacitated person or physically helpless person.

JUDICIAL DECISIONS

3. Evidence.

Victim's testimony that she believed defendant to be 42 years old at the time of the crime was sufficient to prove that defendant was over the age of 18. *Campbell v. State*, — So. 2d —, 2013 Miss. LEXIS 394 (Miss. Aug. 1, 2013).

Evidence that the victim believed that defendant was her foster father, she lived with defendant and his wife for several months, she had her own bedroom in

defendant's residence, she went on family vacations with defendant and his wife, and defendant and his wife imposed rules on the victim was sufficient for the jury to conclude that defendant, while not the victim's license foster parent, was in a position of trust or authority over the victim. *Campbell v. State*, — So. 2d —, 2013 Miss. LEXIS 394 (Miss. Aug. 1, 2013).

§ 97-5-39. Contributing to the neglect or delinquency of a child; felonious abuse and/or battery of a child.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

4. Evidence.
7. Jury instructions.

I. UNDER CURRENT LAW.

4. Evidence.

Defendant was not entitled to a new trial as the verdict finding him guilty of felonious child abuse was not against the weight of the evidence because the doctor who treated the child stated that the burns were not on her dominant fingers and that they were from a solid, hot surface; and defendant's explanations for the child's burned fingers were numerous, contradictory, and inconsistent with the medical testimony. *Harris v. State*, — So. 2d —, 2013 Miss. App. LEXIS 607 (Miss. Ct. App. Sept. 17, 2013).

Evidence supported defendant's child abuse conviction because (1) members of defendant's family testified that defendant was alone in a bathroom with defendant's sixteen-month-old child; (2) the family members heard running bath water and defendant spanking the child with

a belt; (3) the child suffered a bruise below one eye; (4) a family member said the bath water was steaming hot; and (5) an emergency-room physician testified that the child suffered severe hot-water burns to the lower body. *Williams v. State*, — So. 2d —, 2013 Miss. App. LEXIS 494 (Miss. Ct. App. Aug. 13, 2013).

7. Jury instructions.

In a felonious child abuse case, because the child's burns were not caused by a child exploring her environment, the doctor who treated her unequivocally opined that the burns were nonaccidental, the burns came from a hot, solid object, and no reasonable juror could find the child's second-degree burns on nondominant fingers were not considered serious bodily harm, the trial court did not err in refusing to instruct the jury on the lesser-offense of simple assault. *Harris v. State*, — So. 2d —, 2013 Miss. App. LEXIS 607 (Miss. Ct. App. Sept. 17, 2013).

In a felonious child abuse case, because the medical evidence showed that the burns to the child's fingers were second-

degree burns, which could not be classified as anything other than serious bodily harm regardless of their cause, no reasonable jury could find defendant guilty of merely misdemeanor child abuse; thus,

there was no evidentiary basis for a lesser-included instruction on misdemeanor child abuse. *Harris v. State*, — So. 2d —, 2013 Miss. App. LEXIS 607 (Miss. Ct. App. Sept. 17, 2013).

CHAPTER 9

Offenses Affecting Administration of Justice

ARTICLE 1.

IN GENERAL.

§ 97-9-73. Resisting or obstructing arrest; fleeing or eluding law enforcement officer in motor vehicle.

JUDICIAL DECISIONS

1. In general.

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law enforcement officer without committing the

crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State's request for a resisting-arrest instruction. *Edwards v. State*, — So. 2d —, 2013 Miss. App. LEXIS 700 (Miss. Ct. App. Oct. 22, 2013).

ARTICLE 3.

OBSTRUCTION OF JUSTICE.

§ 97-9-127. Retaliation against a public servant or witness.

JUDICIAL DECISIONS

1.-2. [Reserved for future use.]

3. Indictment sufficient.

4. Weight of the evidence.

5. Jury instructions.

1.-2. [Reserved for future use.]

3. Indictment sufficient.

Indictment clearly contained the elements of the retaliation and sufficiently informed defendant of the charge against him because it charged that he unlawfully threatened a police officer by threatening to assault the officer; the act of threatening to harm a police officer in the future is unlawful. *Young v. State*, — So. 2d —, 2013 Miss. LEXIS 392 (Miss. Aug. 1, 2013).

4. Weight of the evidence.

Verdict finding defendant guilty of retaliation was not so contrary to the evidence that to let it stand would sanction an unconscionable injustice, and the evidence did not weigh heavily against the jury's verdict, because defendant threatened to harm an officer by threatening to assault the officer. *Young v. State*, — So. 2d —, 2013 Miss. LEXIS 392 (Miss. Aug. 1, 2013).

5. Jury instructions.

Trial court sufficiently instructed the jury on retaliation because its instruction clearly required the State to prove beyond a reasonable doubt that defendant did

unlawfully threaten to harm the officer by threatening to assault and/or kill him. *Young v. State*, — So. 2d —, 2013 Miss. LEXIS 392 (Miss. Aug. 1, 2013).

CHAPTER 35

Crimes Against Public Peace and Safety

§ 97-35-7. Disorderly conduct; failure to comply with requests or commands of law enforcement officers; penalties; exception.

JUDICIAL DECISIONS

2. Sufficiency of evidence.

Evidence was sufficient to convict defendant of disorderly conduct and the verdict was not against the weight of the evidence because, although instructed by the officer to refrain from using his cell phone for the

safety of the officer and others at the scene, defendant continued to use his cell phone. *Matthews v. City of Madison*, — So. 2d —, 2013 Miss. App. LEXIS 611 (Miss. Ct. App. Sept. 17, 2013).

CHAPTER 37

Weapons and Explosives

GENERAL PROVISIONS

§ 97-37-5. Unlawful for convicted felon to possess any firearms, or other weapons or devices; penalties; exceptions.

JUDICIAL DECISIONS

6. Sufficient evidence.

10. New trial.

6. Sufficient evidence.

As defendant's counsel stipulated to the prior conviction for purposes of a charge against him of possession of a firearm by a convicted felon in order to avoid introduction of evidence that defendant had at least four prior felony convictions, the evidence was sufficient to support the possession conviction. *Rogers v. State*, — So. 2d —, 2013 Miss. App. LEXIS 342 (Miss. Ct. App. June 11, 2013).

10. New trial.

Defendant was not entitled to a new trial on a felony possession charge since the jury was entitled to believe the victim's testimony that defendant had a gun on his person when he came outside, and that defendant produced the gun and shot him; the finding that defendant willfully possessed the firearm with which he shot the victim was supported by the victim's testimony, and officer one's testimony that he saw defendant holding the gun. *Gilmore v. State*, — So. 2d —, 2013 Miss. LEXIS 361 (Miss. June 27, 2013).

§ 97-37-37. Enhanced penalty for use of firearm during commission of felony.

JUDICIAL DECISIONS

2. Double jeopardy.

Defendant's sentence enhancement for using a firearm in the commission of a felony, to wit, aggravated assault, did not violate principles of double jeopardy because the legislature clearly intended an

additional term of imprisonment be applied cumulatively to the underlying offense. *Wansley v. State*, — So. 2d —, 2013 Miss. App. LEXIS 316 (Miss. Ct. App. June 4, 2013).

TITLE 99

CRIMINAL PROCEDURE

CHAPTER 17

Trial

§ 99-17-20. Capital murder or other crimes punishable by death.

JUDICIAL DECISIONS

1. In general.

Defendant juvenile's indictment was not defective because the capital-murder statute was cited in the heading of the indictment but not the body of the indictment since the indictment listed the appropriate section and subsection in the

heading and tracked the language of the statute in the body, and this section did not specify where the charged section and subsection number had to appear in the indictment. *Hye v. State*, — So. 2d —, 2013 Miss. App. LEXIS 292 (Miss. Ct. App. May 28, 2013).

CHAPTER 19

Judgment, Sentence, and Execution

IN GENERAL

§ 99-19-5. Findings of jury.

JUDICIAL DECISIONS

3. Lesser included offenses.

Because, in attempting to prove assault, the State introduced evidence that defendant began swinging at an officer while he was being arrested, and it would have been impossible for defendant to have committed simple assault on a law enforcement officer without committing the

crime of resisting arrest, the offense of resisting arrest was a lesser-included offense of the charged crime of simple assault, and the trial judge was authorized to grant the State's request for a resisting-arrest instruction. *Edwards v. State*, — So. 2d —, 2013 Miss. App. LEXIS 700 (Miss. Ct. App. Oct. 22, 2013).

SENTENCING OF HABITUAL CRIMINALS

§ 99-19-83. Sentencing of habitual criminals to life imprisonment.

JUDICIAL DECISIONS

1. In general.

Sexual intercourse between an under-age child and an adult clearly is a crime of

violence for purposes of the habitual offender statute, as sexual intercourse cannot occur without the exertion of some

degree of physical force, even if it entails no pain or bodily harm and leaves no mark. The same is true for any other sex-crime victim who lacks the capacity to consent. *Taylor v. State*, — So. 2d —, 2013 Miss. LEXIS 395 (Miss. Aug. 1, 2013).

CHAPTER 39

Post-Conviction Proceedings

ARTICLE 1.

MISSISSIPPI UNIFORM POST-CONVICTION COLLATERAL RELIEF ACT.

§ 99-39-5. Grounds for relief; time limitations; “biological evidence” defined.

JUDICIAL DECISIONS

I. UNDER CURRENT LAW.

8. Timeliness.

I. UNDER CURRENT LAW.

8. Timeliness.

Newly discovered evidence exception to the procedural/time bar for an inmate’s postconviction relief motion existed because an aggravated assault victim’s recantation of his prior trial testimony was not newly discovered evidence and did not support a new trial for the inmate. *Van Norman v. State*, — So. 2d —, 2013 Miss. App. LEXIS 312 (Miss. Ct. App. June 4, 2013).

CHAPTER 49

Preservation and Accessibility of Biological Evidence

§ 99-49-1. Legislative intent; definitions; preservation of evidence procedures; remedies for noncompliance.

JUDICIAL DECISIONS

1.-2. [Reserved for future use.]

3. Hypothetical evidence.

1.-2. [Reserved for future use.]

3. Hypothetical evidence.

In a murder case, the State did not violate defendant’s due process rights by destroying evidence in violation of Miss. Code Ann. § 99-49-1 because the very existence of fingerprint or DNA evidence on the murder weapon was nothing more than a hypothetical. *Childs v. State*, — So. 2d —, 2013 Miss. LEXIS 302 (Miss. May 23, 2013).

